FILED

No. 96-1116

DEC 30 1996
OFFICE OF THE CLERK

In The

Supreme Court

of the United States

October Term, 1996

AIRCRAFT BRAKING SYSTEMS CORPORATION,
Petitioner.

v.

LOCAL 856, INTERNATIONAL UNION, UNITED AUTO, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS,

and

AMERICAN ARBITRATION ASSOCIATION, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

PETITION FOR WRIT OF CERTIORARI

Carol MacKenzie
Counsel of Record
Pearl & MacKenzie
800 Jericho Turnpike
Suite 218-E
Syosset, NY 11791
516-921-6645

Edward C. Kaminski
Counsel of Record
Buckingham, Doolittle & Burroughs
50 S. Main Street
P.O. Box 1500
Akron, OH 44309-1500
216-376-5300

Appellate Service: Curry & Taylor (800) 222-8738

144 pp

QUESTIONS PRESENTED

When a party which has agreed to arbitrability seeks to vacate the arbitrator's decision on arbitrability, which standard of review should the courts use: the more deferential standard applied to arbitrators' decisions on the merits, or an independent review?

LIST OF PARTIES

The Petitioner is Aircraft Braking Systems Corporation ("Aircraft")[1] and the Respondents are Local 856, International Union, United Auto, Aerospace and Agricultural Implement Workers ("Union") and American Arbitration Association, Inc. ("AAA"). The AAA did not enter an appearance in the proceedings below.

---

[1] a subsidiary of K & F Industries, Inc.

Table of Contents

Questions Presented i

List of Parties ii

Table of Contents iii

Table of Authorities v

Petition for Writ of Certiorari 1

Opinions Below 1

Jurisdiction 1

Statutes Involved in this Case 2

Statement of the Case 3

Reason for Granting the Writ 7

I. The Sixth Circuit's Opinion Is In Direct Conflict With The Court's Ruling in *First Options v. Kaplan* Concerning Independent Review Of An Arbitration Decision on Arbitrability. 7

Conclusion 10

Appendix A - Opinion and Judgment, Sixth Circuit Court of Appeals, Case No. 95-3774, October 2, 1996 ..... 1a

Appendix B - Memorandum Opinion, United States District Court for the Northern District of Ohio, Case No. 94-0496, June 15, 1994 ..... 25a

Appendix C - Memorandum Opinion, United States District Court for the Northern District of Ohio, Case No. 94-0496, April 4, 1994 ..... **57**

Appendix D - Arbitrator Opinion and Award, March 1, 1995 ..... **59a**

Appendix E - Partial Transcript of Arbitration Hearing, April 28, 1994 ..... **102a**

Appendix F - Order, United States District Court for the Northern District of Ohio, Case No. 93-873, May 14, 1993 ..... **120a**

Table of Authorities

Cases

First Options of Chicago, Inc. v. Kaplan, 115 S.Ct. 1920 (1994) 1, 5, 7, 8, 9

Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960) 9

Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) 9

Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960) 9

Statutes

9 U.S.C. §10 2

28 U.S.C. §1254(1) 2

29 U.S.C. §185(a) 2

PETITION FOR WRIT OF CERTIORARI

Aircraft respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on October 2, 1996, in order to resolve the conflict between the Sixth Circuit's and the decision of the Supreme Court in *First Options of Chicago, Inc. v. Kaplan*, 115 S.Ct. 1920 (1994).

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit that gives rise to this Petition is reported at 97 F.3d 155. It is reprinted in Appendix A hereto. "Appendix A" at p. 1a.

JURISDICTION

On October 2, 1996, the Sixth Circuit Court of Appeals entered a Judgment and Opinion affirming the judgment of the United States District Court for the Northern District of Ohio which vacated the arbitrator's award that the Union's grievance was not arbitrable.

The jurisdiction of the Court to review the judgment of the Sixth Circuit Court of Appeals is pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED IN THIS CASE

The Labor Management Relations Act, 29 U.S.C. §185(a), provides:

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

The Arbitration Act, 9 U.S.C. §10, provides:

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration --

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

STATEMENT OF THE CASE

On March 8, 1994, Aircraft filed a Petition in the District Court for the Northern District of Ohio to enjoin and stay an arbitration scheduled by the AAA for hearing on April 28, 1994. A very brief hearing was held by Judge David Dowd on Aircraft's Motion for a Preliminary Injunction. It was Aircraft's position that there was no agreement to arbitrate as the parties were working under Aircraft's implemented last bargaining proposal which contained neither an arbitration nor a no-strike clause, which is the quid pro quo for the right to arbitrate. The Union maintained that District Judge Sam Bell had ruled in an earlier case that the parties' conduct, pursuant to the implemented last proposal, evidenced an "implied

interim agreement to arbitrate."[2] Judge Dowd's Order, which was docketed on April 4, 1994, consisted of one sentence:[3] "The Court will not enjoin the arbitration of Grievance A-8712 (April 28, 1994)." The Opinion neither mentioned nor discussed Judge Bell's Opinion on whether or not there was an agreement to arbitrate. Memorandum Opinion, p. 2, Appendix C, 57a.

The arbitration hearing opened on April 28, 1994, before Arbitrator Hymen Cohen, Esquire. Aircraft stated that there was no agreement to arbitrate or which empowered the arbitrator to decide the grievance. Having noted its objection on the record, Aircraft proceeded to arbitrate both arbitrability and on the merits. Arb. Transcript pp. 4-5, 16-18, Appendix E 105a-106a, 114a-116a. The Union responded: "Judge Bell had ruled we do have an interim contract. [We] can prove through testimony and documents the union does have a contract with Aircraft Braking Systems. . . .We do indeed have an interim contract, and we would like to

---

2 At the time of the preliminary injunction hearing, Judge Bell's decision, Appendix F (120a-128a), was on appeal to the Sixth Circuit Court of Appeals. The Sixth Circuit did not decide the appeal of Judge Bell's decision until the arbitration proceedings herein were complete. Judge Bell was affirmed by the Sixth Circuit on April 21, 1995 and Aircraft filed a Petition for Certiorari, No. 95-121, which was denied by the Court on October 2, 1995. 116 S.Ct.182.

3 Aircraft sought to stay the arbitration of two grievances. Judge Dowd temporarily enjoined the arbitration of the other grievance on other grounds.

proceed with arbitration." Arbitration Transcript pp. 7, 12, Appendix E; 107a-108a;111a-112a.

Arbitrator Cohen received evidence on both the issues of arbitrability and the merits of the agreement from both parties. There were four days of hearing which were held over a period of five months and an extensive record was developed with testimony and exhibits by both parties on both issues. Aircraft called 8 witnesses and the Union 3. Both parties filed post-arbitral briefs on both the issues of arbitrability and the merits of the grievance. On March 1, 1995, Arbitrator Cohen issued his decision that the grievance was not arbitrable because there was no agreement to arbitrate. Appendix D; pp. 59a-101a.

Aircraft filed a Motion on March 9, 1995, to confirm Arbitrator Cohen's award. The Union filed a Motion to Vacate the award on March 25, 1995.

On April 21, 1995, the Sixth Circuit Court of Appeals affirmed Judge Bell's decision that the grievance before Judge Bell was arbitrable pursuant to an implied interim agreement to arbitrate the grievance at issue before him.

On August 1, 1995, Judge Dowd entered an Order sustaining the Union's Motion to Vacate Arbitrator Cohen's award and ordering the parties to resubmit the merits of the Union's grievance to a new arbitrator. Judge Dowd also awarded the Union its attorney fees. With respect to the issue of arbitrability, Judge Dowd relied upon *First Options of Chicago, Inc. v. Kaplan*, 115 S.Ct. 1920 (1994), stating

that there was not "clear and unmistakable" evidence that the parties had submitted the issue of arbitrability to Arbitrator Cohen. Memorandum Opinion, pp. 14-16, Appendix B, pp. 39a-42a.

On appeal, the Sixth Circuit Court of Appeals affirmed Judge Dowd's judgment in all respects and, with regard to arbitrability, the Sixth Circuit held:

> "The only difference between this case and *First Options* is that the party strongly protesting the arbitrator's authority to decide the issue (Aircraft Braking Systems) won in arbitration. . . . In *First Options*, because Kaplan lost at arbitration on his argument that there was no agreement to arbitrate, he maintained consistently on appeal that he did not submit the issue of arbitration to the arbitrator. Here, Aircraft Braking Systems had the good fortune to win its argument that no agreement existed, and is now claiming that it happily submitted the issue of arbitrability to the arbitrator. Aircraft Braking Systems cannot have it both ways. Taking a passage from the Supreme Court in *First Options*, we note that '[I]nsofar as [Aircraft Braking Systems was] forcefully objecting to the arbitrator deciding [its] dispute . . . one naturally would think that [it] did not want the arbitrator to have binding authority over [it].' *First Options*, *supra,* at 115, S.Ct.

at 1925. Accordingly, we hold that the parties did not submit the issue of arbitrability to the arbitrator."

Opinion, pp. 11-12, Appendix A, pp. 14a-16a.

REASON FOR GRANTING THE WRIT

I. The Sixth Circuit's Opinion Is In Direct Conflict With The Court's Ruling in *First Options v. Kaplan* Concerning Independent Review Of An Arbitration Decision on Arbitrability.

In *First Options, supra*, the Court held the review of an arbitrator's decision about arbitrability is very narrow. Only a party who has objected to arbitrability is entitled to an "independent" review of an arbitrator's decision on arbitrability to determine if that party clearly and unmistakably refused to arbitrate the issue. 115 S.Ct. 1937.

Conversely, the Court further held:

"But, where the party has agreed to arbitrate, he or she, in effect has relinquished much of that right's practical value. The party still can ask a court to review the arbitrator's decision, but the court will set that decision aside only in very unusual circumstances. See, e.g., 9 U.S.C. §10 (Award procured by

> corruption, fraud, or undue means. Arbitrator exceeded his powers) . . .

Id. at p. 1929.

In this case, the Union sought arbitration from the moment it asked the AAA to schedule the arbitration hearing, when it was before Judge Dowd during the preliminary injunction hearing and before the Arbitrator. Aircraft always objected to arbitration: before both Judge Bell and Judge Dowd and before the Arbitrator. However, upon stating its objection to Arbitrator Cohen, Aircraft proceeded to submit the issue of arbitrability to him, advocating its position that there was no agreement to arbitrate.

The parties' submission of the issue of arbitrability was under the same circumstances as if there had been no intervening judicial proceedings. Judge Bell's decision on arbitrability was with respect to a different grievance, it was not based on an express agreement to arbitrate and it was pending on appeal in the Sixth Circuit. Judge Dowd was asked to decide the issue of arbitrability in Aircraft's action to stay the arbitration hearing, but Judge Dowd chose to simply decline to stay the arbitration with no opinion. Thus, both parties were free to either submit the issue of arbitrability or to refuse to proceed as though there had been no proceedings in court. Both parties relinquished their right to independent review of the issue of arbitrability except for the very narrow exceptions set forth in *First Options, supra,* none of which are claimed by either party. Therefore, neither

party was entitled to the independent review contemplated by the Court in *First Options*.

The Sixth Circuit's decision affirming the vacation of Arbitrator Cohen's arbitrability decision is in direct conflict with *First Options* and is appropriate for certiorari. *First Options* is either the first case, or at least one of the very few cases, in which a court has recognized a judicial review of an arbitration decision by any standard other than the deferential standard which has been applied since the *Steelworkers' Trilogy*.[4] The Sixth Circuit, in this case, has not only extended the independent review of an arbitrability decision beyond the scope of the Court's rule in *First Options*, the Sixth Circuit has extended it to a situation which the Court has ruled is not subject to independent review, that is, where a party which agreed to arbitration seeks to vacate the award on arbitrability. Clearly, the Sixth Circuit should have reviewed the arbitrability award by the more deferential standard which permits vacation of an award only where there is corruption, fraud, undue means or where the arbitrator exceeded his powers.

First Options is a most significant decision in the law of arbitration and the conflict created by the decision of the Sixth Circuit is appropriate for certiorari.

---

[4] *Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

Edward C. Kaminski
BUCKINGHAM, DOOLITTLE
& BURROUGHS
A Legal Professional Association
50 South Main Street,
P.O. Box 1500
Akron, Ohio 44308
(330) 376-5300

Carol MacKenzie
PEARL & MACKENZIE
6800 Jericho Turnpike,
Suite 218-E
Syosset, New York 11791
(516) 921-3400

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION: 1996 FED App. 0321P (6th Cir.)
File Name: 96a0321p.06

No. 95-3774

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Aircraft Braking Systems Corporation,
Plaintiff-Appellant,

v.

Local 856, International Union, United Automobile, Aerospace and Agricultural Implement Workers, UAW,
Defendant-Appellee,

American Arbitration Association, Inc.,
Defendant.

On Appeal from the United States District Court for the Northern District of Ohio

---

Decided and Filed October 2, 1996

Before: MARTIN, Chief Judge; DAUGHTREY, Circuit Judge; BECKWITH, District Judge.{*}[1]

BOYCE F. MARTIN, JR., Chief Judge.

Plaintiff Aircraft Braking Systems appeals the district court s order vacating an arbitration ruling that no interim collective bargaining agreement existed between Aircraft Braking Systems and Local 856, UAW. Aircraft Braking Systems also appeals the district courts decision to remand the underlying grievance to a new arbitrator, and the district courts award of attorney s fees in favor of the union. We AFFIRM the district court s judgment and REMAND for further proceedings consistent with this opinion.

The facts of the underlying dispute giving rise to this appeal are stated succinctly in a prior unpublished decision of this Court:

> This case involves a labor dispute between [Aircraft Braking Systems Corporation] and Defendant Union. The Union is the certified bargaining representative for ABS production

---

[1] {*}The Honorable Sandra S. Beckwith, United States District Judge for the Southern District of Ohio, sitting by designation.

and maintenance employees. ABS and the Union were parties to a collective bargaining agreement which, by its own terms, expired on August 10, 1991. Prior to the August 10, 1991 expiration of the collective bargaining agreement, [the parties] entered into negotiations for a new agreement; however, they were unable to reach an agreement on the terms of a new collective bargaining agreement.

On August 10, 1991, ABS informed the Union that it was implementing the terms of its Final Proposal to the Union, on the grounds that the parties had reached an impasse in their bargaining. The Final Proposal stated in relevant part:

The Contract between U.A.W., Local #856 and Aircraft Braking Systems Corporation which by its terms expires at 6:00 PM August 10, 1991, is hereby extended and renewed for a period of three years from August 10, 1991, or the date of ratification whichever is later except as specifically amended hereafter.

. . . .

14. All Company proposals dated June 20, 1991, and all tentative agreements will be incorporated into the Basic Labor Agreement . . . except as modified by the attached Company proposals.

. . . .

The existing collective bargaining agreement between the parties, which expired on August 10, 1991, contained both an arbitration clause and a no-strike clause. One of the proposals made by ABS on June 20, 1991 was to change paragraph 193 of the existing collective bargaining agreement to read:

The parties to this agreement will utilize the services of the American Arbitration Association when the need for arbitration arises.

. . .

This resulted in a unilaterally imposed Final Proposal which reads in relevant part:

Section 2. Grievance Procedure

Step 4

It is hereby agreed that should the above procedure fail to bring about an agreement between the parties with respect to certain grievances, either party may within twenty (20) workings [sic] days after the final written answer as outlined in the agreement above submit the issue to an arbitrator, selected by mutual agreement.

. . . .

181 The parties to this agreement will utilize the services of the American Arbitration

Association when the need for arbitration arises.

184 Specifically the Arbitrator shall not have the power to arbitrate general wage levels or maximum or minimum rates of existing classifications, and the only grievances which may be submitted to the said Arbitrator for hearing and determination shall be those arising out of alleged violation or misinterpretation of the provisions of this agreement;or individual rate grievances within the employees classification (classification in this instance shall include the subdivision).

. . . .

Article V. WORK STOPPAGE
Section 1. No Strike or Lockout

203 It is the express desire of the parties to this Agreement that the procedures contained herein will serve the purpose of affecting a peaceable settlement of all disputes that may arise between them. As long as this Agreement is in effect, the Company will not lock out any employees. As long as this Agreement is in effect, the Union will not cause or permit its members to cause, nor will any employee take part in any strike, sit-down, stay-in or slow-down, or any curtailment of work or restriction of production, or picketing, or interference with production of

the Company in any matter which comes within the jurisdiction of the Arbitrator.

Braking Systems I). In Aircraft Braking Systems I, Aircraft Braking Systems sought a stay of arbitration proceedings brought by the Union on the ground that, because the Union never ratified the Final Proposal set forth in part above, no collective bargaining agreement existed between the parties. According to Aircraft Braking Systems theory, because no agreement existed, there was nothing upon which the arbitrator could base his or her decision, and therefore the grievance at issue was not arbitrable. The district court rejected this argument, finding that, based on the parties respective conduct after the expiration of the prior collective bargaining agreement on August 10, 1991, an interim agreement existed between the parties, which included an agreement to arbitrate certain disputes.[2] After finding that an interim contract existed, the district court refused to issue an injunction to stay the arbitration proceedings that Aircraft Braking Systems sought to avoid. This Court affirmed on appeal, holding that the district court did not commit clear

---

[2] The parties proceeded to arbitration after the expiration of the prior collective bargaining agreement no less than thirty-three times prior to Aircraft Brakings Systems I. Indeed, Judge Bell's District court opinion mentioned that the parties had scheduled an unrelated arbitration for the day following the hearing on Aircraft Braking Systems motion for a preliminary injunction in Aircraft Braking Systems I.

error in finding that a temporary contract existed, which included an agreement to arbitrate certain disputes between the parties. We also rejected Aircraft Braking Systems claim that the district court erred by failing to give Aircraft Braking Systems adequate notice before consolidating the hearing on its motion for a preliminary injunction with the merits of the action. We held that the district court adequately afforded the parties a full and fair opportunity to litigate the matter, stating that:

> [I]n this case, [Aircraft Braking Systems] filed a post-hearing brief which indicated its satisfaction with the state of the record. Further, in its brief on appeal, [Aircraft Braking Systems] has reargued the same issue in the same way and relied on the same evidence. More importantly, in its brief on appeal, [Aircraft Braking Systems] did not indicate what additional evidence it would have presented if it had received notice from the district court. Accordingly, we conclude that [Aircraft Braking Systems] was not prejudiced by the district court's failure to give notice under Fed. R. Civ. P. 65.

Id. at *10 (footnote omitted).

The present case arose on March 8, 1994, when Aircraft Braking Systems, making arguments similar to those it made in Aircraft Braking Systems I, sought to stay arbitration of two grievances, No. A-8779 and No. A-8712, initiated by the Union by

filing a complaint seeking a temporary restraining order and preliminary injunction in district court. At the time, Judge Bell had already issued his opinion and order in Aircraft Braking Systems I, and the appeal was pending in this Court. On April 1, the district court held a hearing on the motion for a preliminary injunction. On April 4, the court issued an order temporarily enjoining the arbitration of Grievance A-8779 for reasons not at issue here. However, the court refused to stay arbitration of Grievance A-8712.

The parties proceeded to arbitration on Grievance A-8712 on April 28. The arbitration hearing was held on four separate days, concluding on September 20, 1994. The arbitrator issued a decision on March 1, 1995, stating his view that Grievance A-8712 was not arbitrable because there was no enforceable agreement to arbitrate. In the arbitrator's view, the district court's order in Aircraft Braking Systems I was not binding upon this [a]rbitrator:

> For were I to comply with the Court's order, I would have to ignore the evidentiary record in this case. In other words, I would be abdicating my role as an [a]rbitrator in determining the intent upon the evidentiary record.
>
> . . . .
>
> The evidentiary record warrants the conclusion that neither the Company nor the

> Union intended to be contractually bound after 6:00 p.m. on August 10, 1991. The fundamental principles of contract law apply in this case. The Company's final offer was not accepted expressly or impliedly by the Union.
>
> the Company's position that there is no agreement to arbitrate the instant dispute is sustained. The Union failed to carry its burden of proving that such an agreement existed between the parties.

The parties thereafter filed respective motions to confirm and vacate the arbitrator s award. On May 4, 1995, the district court ordered the parties to brief the issue whether the doctrines of res judicata or collateral estoppel barred the arbitrator from concluding that no agreement existed in light of the district court s order in Aircraft Braking Systems I. On June 16, the district court issued an order vacating the arbitrator's award on the ground that the parties did not submit the issue of arbitrability to the arbitrator, and that Aircraft Braking Systems was barred by collateral estoppel and res judicata principles from relitigating the issue whether the parties had an interim agreement requiring arbitration. In addition, the district court remanded the grievance to a new arbitrator, stating that the previous arbitrator has indicated his feelings on the issue. Finally, the district court awarded attorney fees in favor of the Union, finding that [t]his position of [Aircraft Braking Systems] that there is no agreement is unjustified, and its continued

litigation against the existence of such an agreement is in bad faith. Aircraft Braking Systems filed this timely appeal.

Because the district court concluded that Aircraft Braking Systems was collaterally estopped from litigating the issue whether an interim agreement existed between the parties, we conduct a de novo review of the district court's decision to vacate the arbitrator s award. See John Morrell & Co. v. Local Union 304A of the United Food and Commercial Workers, AFL-CIO, 913 F.2d 544, 559(8th Cir. 1990); cf. Black v. Ryder/P.I.E. Nationwide, 15 F.3d 573, 582 (6th Cir. 1984). As a preliminary issue, we first address whether an arbitrator is bound by res judicata or collateral estoppel when deciding a matter previously litigated in federal court between the same parties. The district court answered this question affirmatively. This Court has not addressed this precise issue, but those other circuits confronting the problem have held uniformly that arbitrators are bound by prior federal court decisions under the doctrines of collateral estoppel and/or res judicata. See John Morrell & Co., 913 F.2d at 562-63 (vacating arbitration award involving an interpretation of a no-strike clause in the parties agreement contrary to a previous jury determination of the same issue in litigation between the same parties on the ground that consideration of the issue was barred by collateral estoppel principles); Miller Brewing Co. v. Fort Worth Distrib. Co., 781 F.2d 494, 499 (5th Cir. 1986) (reasoning that parties should be barred from seeking relief from an arbitration panel if res judicata principles would bar

relief in federal court because an arbitration award involves the entry of judgment by a court); Telephone Workers Union of New Jersey, Local 827, International Brotherhood of Electrical Workers v. New Jersey Bell Tel. Co., 584 F.2d 31, 33 (3d Cir. 1978) (refusing to confirm an arbitration award on res judicata and collateral estoppel grounds where arbitrator's determination on the arbitrability of an issue was contrary to a previous judicial decision on the same issue). We agree with the reasoning of these cases. Arbitrator's are not free to ignore the preclusive effect of prior judgments under the doctrines of res judicata and collateral estoppel, although they generally are entitled to determine in the first instance whether to give the prior judicial determination preclusive effect. See Trailways Lines, Inc. v. Trailways, Inc. Joint Council, 807 F.2d 1416, 1425 (8th Cir. 1986). However, Aircraft Braking Systems does not argue here that arbitrators are free to ignore prior judicial decisions if the doctrines of collateral estoppel or res judicata apply. Rather, Aircraft Braking Systems claims that the parties submitted the question of arbitrability of the grievance to the arbitrator, or alternatively, that collateral estoppel is not applicable on the facts of this case.

Relying on the Supreme Court s decision in First Options of Chicago, Inc. v. Kaplan, 115 S. Ct. 1920 (1995), Aircraft Braking Systems claims that the parties submitted the issue of the arbitrability of their dispute to the arbitrator. In First Options, the Supreme Court explained that [c]ourts should not assume that parties have agreed to arbitrate arbitrability without clear and unmistakable

evidence that they have done so, id. at 1924 (1995) (citations omitted), also stating that merely arguing the arbitrability issue to an arbitrator does not indicate a clear willingness to arbitrate that issue, i.e., a willingness to be effectively bound by the arbitrator s decision on that point, id. at 1925. In First Options, the defendant Kaplan claimed that he was not a party to the contract at issue, and therefore was not required to submit to arbitration of a dispute arising out of the contract. At issue before the Supreme Court was whether a federal court or the arbitrator should determine if a valid agreement to arbitrate existed between the parties. After explaining that courts should apply ordinary contract principles to determine whether the parties intended to submit the arbitrability issue to the arbitrator, it cautioned that courts normally should decide whether a valid agreement to arbitrate exists between the parties absent clear and unmistakable evidence that the parties submitted the issue to the arbitrator. Id. at 1924. Because the defendant Kaplan had vehemently protested the arbitrator's authority to decide the dispute in First Options, it was held that Kaplan did not clearly and unmistakably submit the arbitrability issue to the arbitrator. Id.

Here, Aircraft Braking Systems protested against the arbitrator's authority to hear the dispute on the ground that there was no agreement on which the arbitrator could base its decision. Aircraft Braking Systems stated at the outset of the proceedings that:

> [W]e want to be on record that we are protesting. We have no choice but to be here so as to avoid contempt of court, but there is going -- there can t be a dispute of a violation of an agreement that doesn t exist.

The Union's representative also indicated his belief that Judge Bell [has] ruled that we do have an interim contract.

Aircraft Braking Systems now argues that, although it did not embrace the idea of proceeding to arbitration, it did agree to proceed and submit the issue of arbitrability to the arbitrator. While this argument is meritless, the statement is true. It has been Aircraft Braking Systems position all along that no interim agreement containing an arbitration clause exists, period. Indeed, that is precisely why it sought to enjoin the arbitration proceedings in this case, and why it sought to enjoin arbitration in Aircraft Braking Systems I. It did not succeed in Aircraft Braking Systems I, and did not succeed in the present case, but was instead forced to go to arbitration. It had absolutely nothing to lose by arguing the interim agreement issue in arbitration; perhaps it could receive a favorable ruling there, contrary to the prior court rulings on the issue. That is precisely what Aircraft Braking Systems received. No doubt, had the arbitrator's ruling been otherwise, Aircraft Braking Systems would be before this Court seeking to have the award vacated on the ground that the parties did not submit the issue of arbitrability to the arbitrator, and instead sought to have that issue decided in district court.

In any event, we do not believe the parties submitted the arbitrability issue to the arbitrator in this case. The arbitrability dispute at issue here is not a dispute concerning the scope of an arbitration clause in an otherwise valid agreement, but rather is a dispute as to whether a valid agreement to arbitrate exists at all. This question traditionally has been answered by the courts. See National Union Fire Ins. Co. v. Belco Petroleum Corp., 88 F.3d 129, 135 (2d Cir. 1996); Three Valleys Municipal Water District v. E.F. Hutton & Co., 925 F.2d 1136, 1140-41 (9th Cir. 1990). This question was also the disputed issue in First Options, and the Supreme Court held that courts should not assume that the parties have agreed to arbitrate the question whether there is a valid agreement to arbitrate without clear and unmistakable evidence that the parties so intended. First Options, 115 S. Ct. at 1924 (citation omitted).

Here, the parties clearly and unmistakably submitted the arbitrability issue to the district court in Aircraft Braking Systems I. The district court held that the parties had an interim collective bargaining agreement, and refused to enjoin arbitration proceedings under that agreement. The court's holding that an agreement exists was affirmed by this Court. Aircraft Braking Systems claim in the present arbitration proceeding that the parties did not have an interim agreement was contrary to the district court s holding in Aircraft Braking Systems I, and the arbitrator s decision to decide that issue was in excess of his authority and in disregard of the law. See John Morrell & Co., 913 F.2d at 563. Indeed, the arbitrator simply stated that

he did not believe that he was bound by the district court s holding, and did not even discuss whether res judicata or collateral estoppel was applicable to the facts before him.

The only real difference between this case and First Options is that the party strongly protesting the arbitrator s authority to decide the dispute (Aircraft Braking Systems) won in arbitration. In First Options, because Kaplan lost at arbitration on his argument that there was no agreement to arbitrate, he maintained consistently on appeal that he did not submit the issue of arbitration to the arbitrator. Here, Aircraft Braking Systems had the good fortune to win its argument that no agreement existed, and is now claiming that it happily submitted the issue of arbitrability to the arbitrator. Aircraft Braking Systems cannot have it both ways. Taking a passage from the Supreme Court in First Options, we note that, [I]nsofar as [Aircraft Braking Systems was] forcefully objecting to the arbitrator deciding [its] dispute . . . one naturally would think that [it] did not want the arbitrator to have binding authority over [it]. First Options, 115 S. Ct. at 1925. Accordingly, we hold that the parties did not submit the issue of arbitrability to the arbitrator.

We also believe that the arbitrator was collaterally estopped from deciding whether an interim agreement existed between the parties.[3]

---

[3] The district court mentioned both res judicata and collateral estoppel as grounds for barring relitigation of this issue. Specifically, collateral estoppel applies here, although the doctrines are

Collateral estoppel provides that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their privies. Montana v. United States, 440 U.S. 147, 153 (1978). Put another way, the doctrine dictates that once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case. Allen v. McCurry, 449 U.S. 90, 94 (1980). This Court has established a four-part test for determining whether and when collateral estoppel bars relitigation of an issue:

> 1) the precise issue raised in the present case must have been raised and actually litigated in the prior proceeding;

---

closely intertwined. Moreover, the differences between them are irrelevant for the purposes of determining whether an arbitrator is obliged to give preclusive effect to a prior court decision between the same parties. Under res judicata doctrine, a judgment on the merits bars a second suit between the same parties or their privies based on the same cause of action. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.5 (1979). Collateral estoppel usually applies when the second suit is on a different cause of action, and the judgment in the prior suit precludes relitigation of issues actually litigated in, and necessary to the outcome of, the first case. Id. In this case, because Aircraft Braking Systems sought to enjoin two entirely different grievances, collateral estoppel is the appropriate doctrine to be applied.

2) determination of the issue must have been necessary to the outcome of the prior proceeding;

3) the prior proceeding must have resulted in a final judgment on the merits; and

4) the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding.

N.A.A.C.P. v. Detroit Police Officers Ass n, 821 F.2d 328, 330 (6th Cir. 1987). Aircraft Braking Systems primary argument against the application of collateral estoppel is that there have been material changes in fact which render the application of collateral estoppel inappropriate. See Montana, 440 U.S. at 159. Specifically, Aircraft Braking Systems bemoans the fact that the hearing before Judge Bell in Aircraft Braking Systems I lasted little more than two hours, whereas the instant arbitration hearing lasted four days, during which Aircraft Braking Systems presented much more evidence on the issue whether an interim agreement existed.

However, this claim is not a claim that material facts changed between the time of Judge Bell's decision and the present arbitration proceeding. Rather, as the district court noted, this is a claim that Judge Bell s decision was based on an incomplete record. There are at least two responses to this argument. First, this Court has already held that Aircraft Braking Systems had a full and fair opportunity to litigate this issue. See Aircraft

Braking Systems I, 1995 WL 236678 at 9-10. Second, assuming that the presentation of the facts to Judge Bell was deficient, a fact, question or right distinctly adjudged in the original action cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view." Montana, 440 U.S. at 162 (quoting United States v. Moser, 266 U.S. 236, 242 (1924)). Accordingly, this argument must fail.

Aircraft Braking also claims that the application of collateral estoppel here would be a manifest injustice, see Shimman v. Frank, 625 F.2d 80, 88-90 (6th Cir. 1980), because Judge Dowd failed to decide the collateral estoppel issue at the hearing on Aircraft Braking Systems preliminary injunction motion, in effect requiring the arbitrator to decide the arbitrability issue. However, no manifest injustice has occurred here. Perhaps the most persuasive reason is that arbitrability would not have been the threshold issue that Aircraft Braking Systems claims it was but for its continued refusal to recognize the effect of Judge Bell s ruling that an interim agreement existed between the parties. Instead, Aircraft Braking Systems representative at the arbitration proceeding argued that he fully expected Judge Bell's ruling to be overturned, and that Judge Bell had not determined that an interim contract existed. Thus, Aircraft Braking Systems was able to maintain its claim that the arbitrator had no authority to hear the instant grievance because no agreement existed between the parties. This bald-faced disregard of the district court s decision in Aircraft Braking Systems I is unfounded. It is even more

incredible that Aircraft Braking Systems still maintains its position in the face of this Court's holding that the parties do have an interim agreement containing an arbitration clause. Were we to adopt Aircraft Braking Systems position, we would in effect be overruling a prior holding of this Court, an activity in which we will not engage.

Aircraft Braking Systems also claims that the district court erred in remanding this case to a new arbitrator. It does not dispute that the district court has the power to remand the case for another arbitration, nor does Aircraft Braking Systems dispute that the district court may, in some circumstances, remand to a new and different arbitrator for further arbitration proceedings. See Grand Rapids Die Casting Corp. v. Local Union No. 159, United Automobile, Aerospace and Agricultural Implement Workers of America, 684 F.2d 413, 416-17 (6th Cir. 1982) (suggesting to the district court that remand should be to a different arbitrator because previous arbitrator s outburst compromised the appearance of impartiality); see also Hart v. Overseas Nat l Airways, Inc., 541 F.2d 386, 393-94 (3d Cir. 1976); Erving v. Virginia Squires Basketball Club, 468 F.2d 1064, 1067-68 (2d Cir. 1972). Rather, Aircraft Braking Systems argues that remand to a new arbitrator is appropriate only where an arbitrator's actions compromise the appearance of impartiality. Further, Aircraft Braking Systems argues, contrary to the district court s conclusion on the issue, that remanding to a new arbitrator produces an unneeded inefficiency, because the former arbitrator is already familiar with the merits of the case.

We begin our analysis here by noting that district courts are usually afforded broad discretion in fashioning appropriate relief. Cf. Hart, 541 F.2d at 393-94 (remanding to the district court to formulate an appropriate remedy to provide for the resolution of the parties differences, including perhaps the appointment of a new arbitrator). The district court remanded this case to a new arbitrator because it believed that by choosing to decide the threshold issue of arbitrability rather than the issue the parties submitted to him, and by ignoring Judge Bell's decision on that very issue, [the arbitrator] has indicated his feelings on the issue. The court also noted that remand to a new arbitrator in this case would not be inefficient because the arbitrator never reached the merits in the prior arbitration proceeding.

Here, the district court did not abuse its discretion. The arbitrator obviously did not believe himself bound by prior judicial resolution of the same issue in a lawsuit involving the same parties, nor did the arbitrator even discuss collateral estoppel in coming to a conclusion in direct conflict with a prior federal court holding. On these facts, the district court's decision to remand the case to a new arbitrator was correct. See Grand Rapids Die Casting, 684 F.2d at 416-17 (arbitrator's outburst clearly evinced negative attitude toward the language of the collective bargaining agreement); Erving, 468 F.2d at 1067-68 (neutral arbitrator was a member of the law firm representing one of the parties).

Finally, Aircraft Braking Systems takes issue with the district court's decision to award attorney's

fees in favor of the union. We review the district court's award of attorney fees for abuse of discretion. Black v. Ryder/P.I.E. Nationwide, 970 F.2d 1461, 1472 (6th Cir. 1992). Attorney's fees may be awarded in cases falling within Section 301 of the Labor Management Relations Act, if a party has acted in bad faith. In Shimman v. International Union of Operating Engineers, Local 18, 744 F.2d 1226 (6th Cir. 1984), we set forth three categories of bad faith:

> 1) bad faith occurring during the course of the litigation;
>
> 2) bad faith in bringing an action or in causing an action to be brought; and
>
> 3) bad faith in the acts giving rise to the substantive claim.

Id. at 1230. Here, the district court characterized its findings as follows:

> Plaintiff's actions in bringing this suit constitute a truly egregious case of misconduct. In the original 1993 proceedings, Defendant sought an award of attorney fees from Judge Bell who deferred the issue to Magistrate Judge Gallas. On March 31, 1994, the Magistrate Judge issued a report and recommendation finding in favor of Defendant on this issue. The Magistrate Judge held that:
>
> Clearly [Aircraft Braking Systems] position that there was no agreement to arbitrate was

> completely untenable and unjustified. There was bad faith in bringing this action.
>
> . . . .
>
> [Aircraft Braking Systems] attempted to prevent this arbitration with no legal or factual basis for its complaint. There was bad faith and the fact that Judge Bell gave this case priority so that arbitration was not delayed does not excuse [Aircraft Braking Systems].

Even after this recommendation, Plaintiff opposed arbitration of the grievance involved in the instant case, maintaining that there was no agreement to arbitrate. Plaintiff then unilaterally submitted the issue of arbitrability to the arbitrator, in an attempt to attain a better result after having lost two court proceedings on the same issue and after having been found to have acted in bad faith by Magistrate Judge Gallas. In maintaining that there was no [collective bargaining agreement] compelling arbitration, Plaintiff violated both this Court's refusal to enjoin arbitration of Grievance #A-8712 and Judge Bell's original decision holding there was an interim agreement to arbitrate, which has since been affirmed by the Sixth Circuit Court of Appeals. . . . When the arbitrator decided there was no agreement to arbitrate, Plaintiff sought this Court's confirmation of the arbitration proceeding to which Plaintiff had protested every day of the hearing.

Aircraft Brakings Systems takes issue with the district court award, although it merely claims to this Court that there is a basis regarding the arbitrability of the issue in this case and the distinctions between this case and the case decided by Judge Bell. It has provided no analysis to support this claim. Of course, this is understandable, because aircraft Braking Systems has no legal foundation to support its claim that Judge Bell s decision did not uphold the interim contract. Moreover, its continued insistence that no agreement exists is clearly contrary to this Court's holding in Aircraft Braking Systems I, which affirmed Judge Bell's conclusion that an interim agreement existed between the parties. In light of this, we affirm the district court's award of attorney fees in favor of the Union. Moreover, we remand this case to the district court in order that the court may award the cost of reasonable attorney s fees incurred by the Union in this appeal.

The district court's order vacating the arbitration award, remanding this grievance to a new arbitrator, and awarding attorney fees in favor of the Union is AFFIRMED. The case is REMANDED so that the district court may award the cost of attorney's fees incurred by the Union as a result is understandable, because Aircraft Braking Systems has no legal foundation to support its claim that Judge Bell s decision did not uphold the interim contract. Moreover, its continued insistence that no agreement exists is clearly contrary to this Court's holding in Aircraft Braking Systems I, which affirmed Judge Bell's conclusion that an interim

agreement existed between the parties. In light of this, we affirm the district court s award of attorney fees in favor of the Union. Moreover, we remand this case to the district court in order that the court may award the cost of rasonable attorney's fees incurred by the Union in this appeal.

The district court s order vacating the arbitration award, remanding this grievance to a new arbitrator, and awarding attorney fees in favor of the Union is AFFIRMED. The case is REMANDED so that the district court may award the cost of attorney's fees incurred by the Union as a result of Aircraft Braking Systems unfounded and bad faith appeal.

Dowd, J.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

Aircraft Braking Systems Corporation, Plaintiff,	)	CASE NO. 5:94 CV 0496
vs.	)	ORDER
united Automobile Aerospace,Agricultural Implement Workers of America, et al, Defendants.	)	(Disposing of Docket Nos. 6 and 14)

I. Introduction

Plaintiff Aircraft Braking Systems Corporation, ("ABSC"), brought this action against Defendant United Automobile, Aerospace, Agricultural Workers of America, UAW, Local 856, ("UAW"), to stay arbitration of two grievances, #A-8779 and #A-8712, alleging that there was no collective bargaining agreement, ("CBA"), between Plaintiff and Defendant compelling arbitration. Defendant counterclaimed seeking an order compelling Plaintiff to arbitrate both grievances, pursuant to the decision of Judge Sam H. Bell in Case No 5:93 CV 873, aff'd ABSC v. UAW, No 93-3614 (6th Cir. April 21, 1995). Judge Bell held that

there was a CBA between Plaintiff and Defendant which compelled arbitration of grievances. In the instant case, this Court temporarily enjoined arbitration of grievance #A-8779, pending resolution of UAW Local 856. et al v. Loral Corp., et al., Case No.5:92 CV 2391, but did not enjoin the arbitration of grievance #A-8712. (Docket No.26) Grievance #A-8712 then proceeded to arbitration.

Plaintiff now moves this Court for an order confirming the arbitration award, which dismissed grievance #A-8712 on the ground that there was no CBA between Plaintiff and Defendant (Docket No.23) Defendant moves for an order vacating the arbitration award on the grounds that the parties were barred by the doctrines of res judicata and collateral estoppel from relitigating the question of the existence of an interim agreement to arbitrate. (Docket No.24) Defendant further moves for an award of attorney fees. (Docket No.27)

II. Background Facts

Defendant is the exclusive collective bargaining representative for Plaintiff's hourly production and maintenance workers. (Compl. ¶7) On August 10, 1991, the CBA between Plaintiff and Defendant expired. (Compl. ¶8) On that same day, Plaintiff unilaterally imposed on Defendant the terms of plaintiff's final proposal, stating that the proposal was thereby "extended and renewed for a period of three years from August 10, 1991, or the date of ratification whichever is later except as amended hereafier." (Searle Aff., Ex. 1) This final proposal included a

grievance and arbitration procedure identical in its substantive provisions to that of the expired agreement. (Compl. ¶10) The only difference was that Plaintiff's final proposal changed the composition of the arbitration panel to utilize the services of the American Arbitration Association. ("AAA"). (Megois Aff., Ex. 10)

Less than a week after Plaintiff implemented its final proposal, Plaintiff sent a letter to Defendant's Chairman of the Executive Bargaining Committee, Donald Hurr, notifying Defendant that Plaintiff would enforce the no-strike provision of the proposal. (Megois Aff., Ex.N). Plaintiff informed Defendant that if Defendant went on strike, Plaintiff would demand arbitration, in accord with the implemented proposal, to determine what relief it was due. (Megois Aff., Ex. N)

Mr. Hurr testified that Defendant agreed that, under the proposal, Plaintiff had the right to demand arbitration. (Transcript of proceedings before Judge Bell, ("Ct. Tr."), 62) Mr. Hurr contended that Defendant recognized that the right was established on August 10, 1991, when Plaintiff implemented its final proposal. (Ct. Tr., 62) Mr. Hurr stated that when Plaintiff became entitled to arbitration, Defendant became bound at the same time to a no-strike provision. (Ct. Tr., 66) Mr. Hurr then testified that Defendant has not formally accepted Plaintiff's proposal: when put to a vote, the union members voted not to ratify it. (Ct. Tr., 70) Mr. Hurr further testified that although Defendant has not agreed to ratify the proposal, it has continued to work under those terms,

including adherence to the no-strike provision. (Ct. Tr., 71)

Plaintiff has participated in the arbitration of approximately 33 labor-related grievances that Defendant filed since August 10, 1991. (Ct. Tr., 46; Searle Aff., 3) Arbitration of these grievances was not ordered by the National Labor Relations Board ("NLRB") but rather was entered into by Plaintiff and Defendant in accordance with the arbitration procedure in Plaintiffs final proposal. (Ct. Tr., 48-50) These arbitration proceedings have been conducted by the AAA, as provided for in Plaintiffs final proposal. (Ct. Tr., 47)

On September 13, 1991. Defendant filed another grievance with Plaintiff claiming that Plaintiff had violated its final proposal by refusing to pay certain bonuses promised in the proposal. (Docket No. 12. Ex. Q) Plaintiff contended that it was not required to arbitrate that particular grievance because there was no contract between the parties compelling arbitration. (Docket No 12, Ex. Q) The matter went before Judge Sam H. Bell, Case No.5:93 CV 873, for resolution of whether there was a valid arbitration clause governing the parties and whether the grievance fell within the terms of that arbitration clause. (Docket No.12, Ex. Q) Judge Bell's May 14, 1993, decision held that "[t]he conduct of both parties is consistent with a finding that an interim agreement containing a grievance-arbitration clause exists." (Docket No.12, Ex. Q) He noted that Plaintiff "is willing to invoke the mandatory grievance-arbitration clause of the imposed contract as both a sword and shield in dealing with its own employers [sic--employees] and the NLRB. When

the same clause is turned against them, as in the instant case, plaintiff is unwilling to admit to the reciprocal obligation which seemingly flows from the clause twice invoked defensively by plaintiff itself." (Docket No.12, Ex. Q) Holding that an agreement to arbitrate did exist, Judge Bell ordered the parties to submit the grievance to binding arbitration.(Docket No. 12, Ex. Q) On April 21, 1995, the Court of Appeals for the Sixth Circuit affirmed the May 14, 1993 ruling of Judge Bell ABSC v UAW No 93-3614 (6th Cir. April 21, 1995).

Prior to Judge Bell's resolution of the action involving that grievance, Defendant submitted two additional grievances to Plaintiff. On September 11, 1991, Defendant submitted grievance #A-8712, claiming Plaintiff had violated the final proposal by having certain work done outside the premises. (Compl. ¶27; Countercl. ¶12) On December 11, 1991, Defendant certified the grievance to arbitration. (Countercl. ¶14) On January 10, 1992, Defendant submitted to Plaintiff grievance #A-8779, concerning Plaintiff's implementation of the "Comprehensive Medical Plan" provided for in Plaintiff's final proposal. (Compl. ¶14; Countercl. ¶9) On February 28, 1992, Defendant certified the grievance to arbitration. (Countercl. ¶11) Plaintiff refused to arbitrate both grievance #A-8712 and #A-8779, contending that they are not arbitrable and that there is no agreement to arbitrate. (Countercl. ¶ 18, 19)

On November 10, 1992, Defendant filed suit in this court, UAW v. Loral Corp., Case No. 5:92 CV 2391, alleging that Plaintiff and Loral violated the

CBA by implementing the "Comprehensive Medical Plan" provided for in Plaintiff's final proposal. (Compl. ¶17) Subsequently, on January 12, 1993, Plaintiff and Defendant entered into a written Stand Still Agreement concerning grievance #A-8779, which also concerned the medical plan. (Compl. ¶ 18) The agreement provided that grievance #A-8779 be held in abeyance pending final determination in Case 5:92 CV 2391. (Compl.¶18) On January 20,1993, the AAA also agreed to hold grievance #A-8779 in abeyance pending the outcome of the litigation in Case No.5:92 CV 2393. (Compl.¶19)

On August 16, 1993, Defendant advised Plaintiff that it wished to revive the arbitration of grievance #A-8779, contending that the Stand Still Agreement no longer barred its arbitration because the part of Case No. 5:92 CV 2391 which concerned Plaintiff and Defendant had been dismissed, thus lifting the Stand Still Agreement. (Compl. ¶22; Def.'s Answer, ¶20) On January 19, 1994, the AAA informed the parties that the arbitration of grievance #A-8779 would go forward on April 6, 1994. (Compl. ¶25) Then, on February 11, 1994, the AAA informed the parties that arbitration of grievance #A-8712 would go forward on April 28, 1994. (Compl. ¶30)

On March 8, 1994, after Judge Bell's decision but before the Sixth Circuit's affirmance, Plaintiff initiated this action to stay the April 1994 arbitration of both gnevance #A-8779 and #A-8712 on the grounds that there was no agreement to arbitrate between the parties and because #A-8779 was barred from arbitration by the Stand Still Agreement. (Compl. ¶1)

On April 4, 1994, this Court issued an Order enjoining the arbitration of grievance #A-8779 (April 6, 1994), finding that the Stand Still Agreement between Plaintiff and Defendant remained in effect and prohibited that particular arbitration. (Docket No.21) Arbitration of grievance #A-8712, (April 28, 1994), was not enjoined. (Docket No.21) Grievance #A-8712 proceeded to arbitration on April 28, 1994, for a decision on its ments.

Despite the May 14, 1993, decision of Judge Bell in Case No.5:93 CV 0873 holding that there was an agreement between the parties compelling arbitration of grievances, and this Court's April 4, 1994, Order refusing to enjoin arbitration of grievance #A-8712. Arbitrator Hyman Cohen decided the parties had no agreement to arbitrate. (Docket No.23, Attach.) On the first day of arbitration, and at the beginning of every subsequent day of the hearings, Plaintiffs representative, Murray Portnoy, told Arbitrator Cohen that Plaintiff was there as a result of Judge Bell's decision and under protest because there was no agreement between the parties compelling arbitration from which the arbitrator could draw his authority to resolve the dispute. (Arb. Tr., 5) Arbitrator Cohen then stated that Mr. Portnoy had raised a threshold issue to be decided, because absent an agreement to arbitrate, the arbitrator has no authority in the matter. (Arb. Tr., 8-12) Arbitrator Cohen concluded that because Plaintiff contended there was no agreement and Defendant contended there was an agreement, the first issue he had to resolve was whether or not an agreement existed. (Arb. Tr., 16) Assuming he found existence of an agreement, Arbitrator Cohen stated

that he would then decide the issue of the alleged violation prompting the grievance. (Arb. Tr., 17)

The arbitration hearing was four days long, held over the span of approximately five months. During that time, Arbitrator Cohen heard testimony and cross-examination from the two witnesses who testified before Judge Bell in Case No.5:93 CV 873: Edward J. Searle, Director of Human Resources for ABSC, and Donald Hurr, Chairman of the Executive Bargaining Committee for the UAW. In addition, both Plaintiff and Defendant called several witnesses who had not testified at trial.

One of Plaintiffs new witnesses, James J. Williams, vice-president of Manufacturing for Aircraft Braking Systems, gave testimony not mentioned at the trial, concerning a decline in the number of employees who worked the voluntary ovetime in response to Plaintiffs implementation of the final proposal. (Arb. Tr., 459) He testified that prior to August 10, 1991, the employees met whatever overtime ABSC posted, but after August 10, 1991, the response to overtime postings was almost zero. (Arb. Tr., 461) Mr. Searle, one of Plaintiff's witnesses, testified at both the trial before Judge Bell and the arbitration hearing that the plant employees showed their dissatisfaction with ABSC's implementation of the final proposal by yelling "FYLO" ("forget your last offer" or "f--k your last offer") as they walked down the main aisles of the plant. (Ct. Tr., 29; Arb. Tr., 593-594) Mr. Hurr, one of Defendant's witnesses, testified at both the trial before Judge Bell and the arbitration hearing that Defendant had voted not to ratify Plaintiff's final proposal and had thus not formally agreed to the

no-strike provision of the agreement. (Ct. Tr., 70; Arb. Tr., 275) Mr. Searle testified under cross-examination at both the trial and the arbitration hearing that Defendant has not gone out on strike and has in fact continued to work under Plaintiff's final proposal. (Ct. Tr., 52; Arb. Tr., 619) Further, Mr. Searle testified at both the trial and the arbitration hearings that since August 10, 1991, Plaintiff has arbitrated approximately 33 grievances. (Ct. Tr., 47; Arb. Tr., 581)

On March 1, 1995, Arbitrator Cohen gave his decision that there was no agreement between Plaintiff and Defendant compelling arbitration. Arbitrator Cohen stated that there was no evidence that Defendant had accepted Plaintiff's offer. (Docket No.23, Attach.) Further, he stated that merely working under the implemented offer does not establish Defendant's acceptance of the offer. (Docket No.23, Attach.) He concluded that as the "duty to arbitrate is the quid pro quo for a no strike clause in a collective bargaining agreement," since Defendant had not ratified the proposal it was not bound by the no-strike provision, and Plaintiff was accordingly under no duty to arbitrate the grievance. (Docket No.23, Attach.) Arbitrator Cohen stated that the conduct of the employees in refusing to work the overtime and yelling "FYLO" showed their intent not to be bound by the proposal, and was compelling evidence that there was in fact no acceptance and no agreement. (Docket No.23, Attach.) Arbitrator Cohen did not mention the parties' arbitration of approximately 33 other grievances that were submitted after August 10, 1991. (Docket No. 23, Attach.)

On March 9, 1995, Plaintiff filed a motion to confirm the arbitration award. (Docket No. 23) On March 22, 1995 Defendant filed a motion to vacate the arbitration award on the grounds that the parties were barred by the doctrines of res judicata and collateral estoppel from relitigating the question of the existence of an interim agreement to arbitrate. (Docket No.24) This Court ordered the parties to file memorandums addressing the issues of res judicata and collateral estoppel and the scope of this Court's authority in the event Judge Bell's decision applies. (Docket No.26) On May 10, 1995, the parties complied with this order, (Docket Nos. 27, 28, 29), and Defendant further submined a motion for an award of attorney fees. (Docket No.27)

III. Res Judicata and Collateral Estoppel[1]

A. Res Judicata and Collateral Estoppel Standard

The doctrines of res judicata and collateral estoppel state a fundamental precept of law that a "right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction cannot be disputed in a subsequent suit between the same parties or their privies. Montana v.

---

[1] Although there are arguments both for and against the underlying question of the existence of a CBA, this Court finds no need to conduct an extensive review of the merits of this issue in light of Judge Bell's clear decision which already addressed the issue and has been upheld on appeal. ABSC v. UAW, No. 93-3614, slip op.

United States, 440 U.S. 147, 153 (1978) (quoting Southern Pac R.R. Co. v. United States, 168 U.S. 1, 48-49 (1897)). The doctrine of res judicata dictates that a final judgment on the merits bars further claims based on the same cause of action. Montana, 440 U.S. at 153. Under the doctrine of collateral estoppel, "once a court has decided an issue of fact or law necessary to its judgment. that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first cause." Allen v. McCurry, 449 U.S. 90, 94 (1980) (citations omitted). The Sixth Circuit has held that there are four requirements of collateral estoppel that must be met before a party's litigation of an issue is barred: "(1) the precise issue raised in the present case must have been raised and actually litigated in the prior proceeding; (2) determination of the issue must have been necessary to the outcome of the prior proceeding; (3) the prior proceeding must have resulted in a final judgment on the merits; and (4) the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding." N.A.A.C.P. Detroit Branch v. Detroit Police Officers Ass'n, 821 F.2d 328, 330 (6th Cir 1987). Similarly, res judicata does not apply if a party did not have a "full and fair opportunity "to litigate the claim or issue in the prior action. The Fellowship of Christ Church v Thorburn, 758 F.2d 1140, 1144 (6th Cir. 1985) (citations omitted). The policy reason for this is that "[t]o preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility

of inconsistent decisions." Montana, 440 U.S. at 153-154.

The Sixth Circuit has noted, however, that "[n]either collateral estoppel nor res judicata is rigidly applied. Both rules are qualified or rejected when their application would contravene an overriding public policy or result in manifest injustice." Bronson v. Board. of Educ., 525 F.2d 344, 349 (6th Cir. 1975) (citations omitted). "[C]hanges in facts essential to ajudgment will render collateral estoppel inapplicable in a subsequent action raising the same issues," in order to avoid injustice. Montana 440 U.S. at 159. See also United States v. Certain Land at Irving Place and 16th St., 415 F.2d 265, 269 (2d Cir. 1969) (change in yearly economic impact on lessor of lessee's exercise of option to renew lease is a change in a material fact making inapplicable collateral estoppel in subsequent litigation between same parties involving same lease and same issue); Metcalf v. Commissioner, 343 F.2d 66, 67-68 (1st Cir. 1965) (change in ex-wife's marital status since first judicial decision having tax ramifications for ex-husband is a change in material fact making inapplicable collateral estoppel in subsequent litigation between same parties involving same issue); Alexander v. Commissioner, 224 F.2d 788, 792-793 (5th Cir. 1955) (change in tax rate due to a different taxable year since first judicial decision is a change in material fact making inapplicable res judicata and collateral estoppel in subsequent litigation between same parties involving same issue).

Absent such changes in circumstances, a party may not retry 'matters which were actually litigated and determined in the first proceeding....Once a party has

fought out a matter in litigation with the other party, he cannot later renew that duel. Commissioner v. Sunnen, 333 U.S. 591, 598 (1947). That the particular facts of a later dispute differ is of no significance: if the legal issue is the same and involves the same parties, litigation of the subsequent dispute is barred by res judicata and collateral estoppel. National Post Office Mail Handlers v. APUW, 907 F.2d 190, 192 (D.C. Cir. 1990). "[A] judgment upon the merits constitutes an absolute bar to a subsequent suit upon the same cause of action in respect to every matter offered and received in evidence, or which might have been offered to sustain or defeat the claim in controversy." Southern Pac. R.R. Co., 168 U.S. at 50. Further, "a fact, question or right distinctly ajudged in the original action cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view or by an erroneous application of the law." Montana, 440 U.S. at 162 (citations omitted). Thus, only the changed condition of a material fact or a "change in the legal climate" will provide a basis for subsequent litigation of the same facts and issue. Montana, 440 U.S. at 161-162.

B. Applicable Law of Arbitration

As a general rule, the court has the authority to decide the threshold question of the arbitrability of an issue. AT&T Technologies v. Communications Workers, 475 U.S. 642, 649 (1985). If, however, the parties have agreed to submit to the arbitrator the question of arbitrability, then the court should give considerable deference to the arbitrator, setting aside his decision only in narrow circumstances. First Options of Chicago Inc. v. Kaplan, No.94-560, 1995

U.S. LEXIS 3463, at *7 (May 22, 1995). However, "courts should not assume that the parties agreed to arbitrate arbitrabilly unless there is 'clear and unmistakable' evidence that they did so First Options supra at *12 (quoting AT&T Technologies, 475 U.S. at 649). This is because arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit." AT&T Technologies, supra, at 648 (citations omitted). Arbitrators therefore have the authority to decide only those disputes which the parties have agreed in advance to submit to arbitration. AT&T Technologies, supra, at 648-649.

The arbitrator's award will be binding on the parties and upheld by the courts as long as it "draws its essence from the collective bargaining agreement," and is not merely "his own brand of industrial justice." United Paperworkers Int'l Union v. Misco, 484 U.S. 29, 36 (1987) (quoting United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960)). Courts have held, however, that an arbitrator is bound by res judicata and collateral estoppel when deciding matters involving "the same parties, the same union, essentially the same issue, and interpretation of the same contract." John Morrell & Co. v. Local Union 304A, 913 F.2d 544,562-563(8th Cir. 1990). See also MillerBrewing Co., v. Fort Worth Distrib. Co., 781 F.2d 494,499(5th Cir. 1986) ("Since an arbitration award involves the entry of judgment by a court, parties should be barred from seeking relief from arbitration panels when, under the doctrine of res judicata, they would be barred from seeking relief in the courts.");Telephone Workers Union v. New Jersey Bell Tel., 584 F.2d 31,33 (3d Cir. 1978) (court refused,

on basis of res judicata and collateral estoppel, to confirm arbitration award that decided arbitrability of an issue contrary to previous judicial decision involving same parties, same issue and same consent decree).

C. Application of the Law to the Facts

In this case, Plaintiff argues that the arbitrator's award should be confirmed despite the fact that he decided the issue of arbitrability of the grievance differently than Judge Bell in the previous court case, No 5:93 CV 873, involving the same parties and the same CBA. Judge Bell decided there was a CBA compelling arbitration of grievances between Plaintiff and Defendant; at the arbitration hearing, the arbitrator decided there was no such CBA between the parties. Plaintiff argues that the doctrines of res judicata and collateral estoppel do not apply here for two reasons: (1) here, the parties submitted the question of arbitrability of the grievance to the arbitrator and thus gave him the authority to decide the matter; and (2) the arbitration award was made based on facts that were not presented to Judge Bell.

1. The Initial Determination of Arbitrability

Plaintiff's argument that the Court must confirm the arbitration award because Plaintiff and Defendant gave the arbitrator the authority to determine the issue of arbitrability by mutually agreeing to submit the question to him is without merit based on the facts in the record. On April 4, 1994, this Court refused to enjoin arbitration of grievance #A-8712, the grievance of the instant case Grievance #A-8712 proceeded to arbitration on April 28, 1994. At the very outset of the

first day of the arbitration hearings, Arbitrator Cohen stated they were there to resolve grievance #A-8712. Plaintiff's representative, Murray Portnoy, however, stated that Plaintiff was there "under protest" because there was no CBA from which the arbitrator could draw his authority to decide the grievance. Mr. Portnoy later added that Plaintiff "holds the same position as was testified earlier, that if the union was displeased with the arbitrator's ruling they could strike to try to vacate the award" because as Plaintiff felt there was no agreement compelling Plaintiff to arbitrate, there was no no-strike provision binding Defendant. (Arb. Tr., 560-561). Defendant's representative, Robert Krunich, responded that Judge Bell had held that the parties did have a contract compelling arbitration. Mr. Kunich further stated that Defendant could prove the contract's existence to Arbitrator Cohen. Arbitrator Cohen then decided that because Mr. Portnoy had raised the threshold question of the existence of a CBA, that issue would have to be decided before proceeding to the merits of the grievance. The parties then proceeded to present the issue of the existence of a CBA to Arbitrator Cohen.

Plaintiff points to both parties' appearance at the arbitration hearings and presentation of the issue of arbitrability as an indication of their mutual submission of that issue to arbitration and their willingness to be bound by the arbitrator's decision. The law states, however, that courts should not assume that the parties have agreed to arbitrate arbitrability without "clear and unmistakable" evidence that they have done so. First Options, 1[illegible] U.S. LEXIS, at *13. As the First Options court held, "merely arguing the arbitrability issue to an arbitrator does not indicate a

clear willingness to arbitrate that issue i.e., a willingness to be effectively bound by the arbitrator's decision on that point First Options, supra, at * 15. There, the fact that the defendant showed up at the arbitration hearing and argued arbitrability was not "clear and unmistakable" evidence of its submission of that issue to the arbitrator. First Options, supra, at * 15. Similarly, here, the fact that Plaintiff and Defendant argued the issue of arbitrability does not indicate a submission of that issue to the arbitrator.

To the contrary, the fact that Plaintiff, through Mr. Portnoy, forcefully voiced its protest to the arbitrator deciding the dispute shows that Plaintiff did not want the arbitrator to have authority over Plaintiff at all. This is further evidenced by the fact that Mr. Portnoy stated that Plaintiff recognized that Defendant could, at the end of the arbitration, strike to try to vacate the award if unhappy with it because the arbitration and any award did not bind Plaintiff or Defendant In First Options the court held that the defendants' forceful objections to the arbitrator deciding the dispute clearly showed they did not voluntarily submit the issue of arbitrability to the arbitrator. First Options, supra, at *16-18. Similarly, Plaintiff's daily statement at arbitration that it was proceeding "under protest" shows it did not voluntarily submit any issue to the arbitrator. As the First Options court held that the issue of arbitrability of thedispute was subject to judicial review there because the defendants did not agree to submit the question to the arbitrator, so too is the Court here able to review Arbitrator Cohen's decision of arbitrability because the evidence shows that Plaintiff and Defendant did not

agree to submit the question of arbitrability to Arbitrator Cohen.

2. The Effect of Different Facts Presented at tbe Arbitration Hearings

Plaintiff's argument that the doctrines of res judicata and collateral estoppel do not apply because the facts presented to Arbitrator Cohen were different from those presented to Judge Bell is without merit under established case law. Plaintiff brought the issue of the existence of a CBA before Judge Bell. Plaintiff had the opportunity to try the case before the Judge. Plaintiff chose to call only one witness, Edward J. Searle, Director of Human Resources for ABSC, to testify before the court. Defendant chose to call only one witness, Donald Hurr, Chairman of the Executive Bargaining Committee for the UAW. Both Plaintiff and Defendant had the opportunity for cross-examination and then redirect examination of the witnesses. Both parties submitted documents as evidence at the trial. At the end of the parties' presentation of the case, Judge Bell held that "every tangible indicia of the intent of the parties shows that both sides believed and behaved according to the view that a grievance-arbitration agreement was in force between the parties. It is impossibie for this court to conclude otherwise...." Case No.5:93 CV 0873, aff'd ABSC v. UAW, No. 93-3614 (6th Cir. April 21, 1995). Judge Bell held that Plaintiff's arbitration of approximately 33 grievances pursuant to the arbitration provision in the final offer after August 10, 1991 was conduct indicating Plaintiffs belief that a contract existed. Further, Judge Bell held that Defendant's continued work under the terms of the

final offer without a strike was conduct indicating Defendant's acceptance of Plaintiff's unilateral offer for interim employment and was, in fact "most telling of all" that there was an interim contract between Plaintiff and Defendant.

Then, at the arbitration hearings involving grievance #A-8712, both Plaintiff and Defendant called more witnesses than they had at the trial before Judge Bell. Plaintiffs witnesse's gave extensive testimony about the employees' yelling of "FYLO" and the decline in the percentage of workers who volunteered to work the mandatory overtime. Arbitrator Cohen had the same evidence of Plaintiffs arbitration of the 33 grievances and Defendant's continued work without a strike, but decided that the yelling and the decline of overtime volunteers indicated an intent not to be bound that outweighed the other evidence and showed that Defendant did not recognize a contract between Plaintiff and Defendant. Arbitrator Cohen thus concluded that because Defendant voted not to ratify the contract, Defendant did not embrace the no-strike provision and thus there was no arbitration clause binding Plaintiff to arbitrate grievances.

Plaintiff argues that this extensive evidence given by its new witnesses about the conduct of the employees is a change in material facts that make inapplicable res judicata and collateral estoppel. This argument is without merit for two reasons. In the first place, this argument fails because Plaintiff had the "full and fair oppontunity" to litigate its claim, which is required for application of res judicata and collateral estoppel. See Montana, 440 U.S. at 153-154; The

Fellowship of Christ Church et al., 758 F.2d at 1144; N.A.A.C.P. Detroit Branch. et al., 821 F.2d at 330 John Morrell & Co., 913 F.2d at 564. In John Morrell & Co., the court held that the arbitrator was bound by the court's earlier decision because "[b]oth parties presented abundant evidence on the issue at trial, and both had strong incentives to litigate the issue fully. Furthermore, the jury's verdict addressed the exact issue which the arbitrator chose to reconsider." 913 F.2d at 564. Similarly, here both Plaintiff and Defendant had the opportunity to present evidence at trial and had incentives to present their case fully. Further, they each presented the same evidence at the arbitration hearings that was given at trial, albeit in more detail at the hearings. Thus, because Plaintiff had the "full and fair opportunity" to litigate the matter of the existence of a CBA, there is no injustice to refuse Plaintiff a chance to relitigate it. On the contrary, it is unfair to Defendant to subject it to the "expense and vexation attending multiple lawsuits." Montana, 440 U.S. at 153-154.

In John Morrell & Co., because the parties had the opportunity to fully litigate the matter, the court held that there was "no really good reason for permitting it to be litigated again." 913 F.2d at 564. Similarly, here Plaintiff and Defendant had the "full and fair opportunity" to litigate the question of the existence of a CBA and so there was no reason for it to be relitigated. As the John Morrell & Co. court vacated the arbitrator's award because it had ignored the court decision, so too does this Court vacate Arbitrator Cohen's award because it ignored the precedent set by Judge Bell's decision.

Secondly, in view of Judge Bell's decision, the doctrines of res judicata and collateral estoppel apply with regard to the arbitrator's decision as to the existence of a CBA because Plaintiff does not show a change in material facts from the trial to the arbitration proceedings, and the same legal issue is involved in both. The law states that only evidence of a change in material fact from the first action to the second will make inapplicable res judicata and collateral estoppel. Montana, 440 U.S. at 159. Here, Plaintiff does not allege that any new events have taken place since the trial before Judge Bell. Moreover, Plaintiff does not allege that the facts that Judge Bell relied on to make his decision had changed before the arbitration hearings took place. Rather Plaintiff argues that Judge Bell's decision was reached upon an incomplete presentation of facts. Assuming for the sake of argument that this is true, it is insufficient as a matter of law to bar res judicata and collateral estoppel. As the Montana court held, "a fact, question or right distinctly adjudged in the original action cannot be disputed in a subsequent action, even though the deterrnination was reached upon an erroneous view." 440 U.S. at 162 (citations omitted). Thus, according to the principles of res judicata and collateral estoppel, Plaintiff was precluded from relitigating the facts around the issue of the existence of a CBA because Judge Bell had already decided it. Although Arbitrator Cohen took a different view of the facts, he was bound by res judicata and collateral estoppel to follow Judge Bell's decision. See John Morrell & Co., 913 F.2d at 563 (where the trial and the arbitration proceeding both arose out of the same factual circumstances and involved the same parties

and contract, the arbitrator was bound by principles of res judicata and collateral estoppel to follow the prior judicial decision). See also Miller Brewing Co., 781 F.2d 494; Telephone Workers Union ot New Jersey, Local 827,584 F.2d 31. Here, as in John Morrell & Co., the trial and the arbitration proceeding involved the same parties and arose out of the same situation involving the question of the existence of a CBA compelling arbitration. Thus, as the court there held the arbitrator was bound by res judicata and collateral estoppel to follow the judicial decision, here too, was Arbitrator Cohen bound by res judicata and collateral estoppel to follow Judge Bell's decision holding there was a CBA compelling arbitration. As the court there vacated the award because the arbitrator ignored the prior judicial decision, so too is Arbitrator Cohen's award vacated here because he ignored Judge Bell's decision that there was a CBA compelling arbitration.

IV. Court's Authority to Remand to Arbitration

A. Applicable Law

An arbitrator's award is legitimate so long as it draws its essence from the CBA. Grand Rapids Die Casting v. Local Union No. 59. United Auto., Aerospace and Agric. Implement Workers of Am. UAW, 684 F.2d 413,416 (6th Cir. 1982). "When the arbitrator's words manifest an infidelity to his obligation, courts have no choice but to refuse enforcement of the award." Grand Rapids Die Casting, supra. Where the arbitrator did not decide the question presented to him, it is appropriate for the court to remand "to avoid the draconian choice of penalizing either the company or

the employee for what is, after all, the arbitrator's failure." Grand Rapids Die Casting, supra, at 416. Under federal common law of labor, if a court vacates an arbitration award, the court has the power to remand the matter to arbitration when appropriate. Grand Rapids Die Casting, supra; see also Locals 2222,2320-2327, Int'l Bhd of Elec. Workers v. New England Tel. and Tel. Co., 628 F.2d 644, 647 (1st Cir. 1980); United Steelworkers of Am. v. Timken Roller Bearing Co., 324 F.2d 738,741 (6th Cir. 1963).

Courts generally remand a matter to the same arbitrator when the arbitrator has made an ambiguous award or when the arbitrator resolved one but not all of the issues submitted to him. Industrial Mutual Ass'n. Inc. v. Amalgamated Workers. Local Union No. 383, 725 F.2d 406, 412 n. 3 (6th Cir. 1984). See also United Steelworkers Local 4839 v. New Idea Farm, 917 F.2d 964, 970 (6th Cir 1990) (remand to same arbitrator for clarification of ambiguous language of his damages award); AFL-CIO v. Crown Cork & Seal Co., 300 F.2d 127 (3d Cir. 1962) (remand to same arbitrator for resolution of the second of the two issues submitted to him). Further, if the court vacates part of the arbitrator's award, it is appropriate to remand to the same arbitrator for final resolution of the issues because he is already familiar with all the evidence. See Harvey Aluminum Inc. v. United Steelworkers of Am. AFL-CIO, 263 F.Supp. 488 (CD. Cal. 1967) (remand to same arbitrator for taking of testimony of witness arbitrator refused to hear at first hearing).

B. Application of the Law to the Facts

Here, Arbitrator Cohen's award will be vacated because it was barred by res judicata and collateral estoppel and because he did not decide the question presented to him, but rather decided the threshold question of arbitrability, which had already been decided by Judge Bell. Grand Rapids Die Casting, 684 F.2d at 41. The law does not require that the case be remanded to Arbitrator Cohen because this is not a situation where the court is asking for a clarification of the award nor is this a situation where the arbitrator decided some but not all of the issues presented to him. See generally Industrial Mutual Ass'n Inc., 725 F.2d at 412 n.3. Rather, this is a situation where Arbitrator Cohen did not decide the merits of the dispute that the parties submitted to him, i.e. grievance #A-8712. He did not hear any evidence pertaining to that issue, and thus there is no efficiency argument for remanding to turn, as there is when the arbitrator has heard all the evidence. Further, the Sixth Circuit has remanded disputes to a different arbitrator in situations where the first one had not decided the question presented to him and the court felt that the arbitrator had indicated his feelings on the merits of the case. Grand Rapids Die Casting, 684 F.2d at 416-417. Here, the Court finds that by choosing to decide the threshold issue of arbitrability rather than the issue the parties submitted to him, and by ignoring Judge Bell's decision on that very issue, Arbitrator Cohen has indicated his feelings on the issue. Therefore, the Court holds that, in the interest of fairness to all parties, grievance #A-8712 is remanded to arbitration by a different arbitrator with the AAA.

V. Award of Attorneys Fees

A. Applicable Law

It is true that §301 of the Labor Management Relations Act contains no provision for the award of attorney fees to the prevailing party. See Monroe Auto Equip. Co. v. International Union, United Automotive Aerospace and Agric. Implement Workers of Am. (UAW), Monroe Auto Equip. Co., Unit of Local 878,981 F.2d 261,270 (6th Cir. 1992); Knollwood Cemetery,789 F.2d 367, 369 (6th Cir. 1986). However, the above cited cases explain that the general American rule of no fee-shifting would still award a party attorney fees if the other party pursued or defended its lawsuit in bad faith or without justification As the Monroe court explained:

> This court in Ray A. Scharer and Co. v. Plabell Rubber Products, 858 F.2d 317, 320 (6th Cir. 1988) explained that exception by stating that the normal [American] rule does not apply, however, where a party or counsel have acted in bad faith in the instigation or conduct of litigation, and in those circumstances, the court has the inherent authority to assess an award of attorney fees against either the litigant or his attorney." (citations omitted). The court went on to say that "[a] award of attorney's fees...is an extreme sanction, and must he limited to truly egregious cases of misconduct." (citations omitted).

981 F 26 at 270. There are three categories of bad faith: "(1) bad faith occurring during the course of the

litigation; (2) bad faith in bringing an action or in causing an action to be brought; and (3) bad faith in the acts giving rise to the substantive claim." Shimman v. International Union of Operating Eng'rs. Local 18,744 F.2d 1226, 1230 (6th Cir. 1984). The Sixth Circuit does not allow an award of attorney fees based solely on the third category involving the underlying claim. Shimman, supra. at 1233. However, courts have "consistently recognized attorney fees as awardable where a meritless claim or defense is maintained in bad faith." Shimman, supra. at 1230. Finally, while the court may impose "a reasonable attorney's fee" on finding bad faith, the Sixth Circuit has held that" 'a reasonable attorney's fee' does not necessarily mean actual legal expenses incurred." Jackson v. Law firm of O'Hara. Ruberg, Osborne and Taylor, 875 F.2d 1224, 1229 (6th Cir. 1989).

B. Application of the Law to the Facts

Plaintiff's actions in bringing this suit constitute a truly egregious case of misconduct. In the original 1993 proceedings, Defendant sought an award of attorney fees from Judge Bell who deferred the issue to Magistrate Judge Gallas. On March 31, 1994, the Magistrate Judge issued a report and recommendation finding in favor of Defendant on this issue. (Docket No.27, Ex. A) The magistrate Judge held that:

> Clearly, [ABSC's] position that there was no agreement to arbitrate was completely untenable and unjustified. There was bad faith in bringing this action.

> ...[ABSC1 attempted to prevent this arbitration with no legal or factual basis for its complaint. There was bad faith and the fact that Judge Bell gave this case priority so that arbitration was not delayed does not excuse [ABSC].

(Docket No 27, Ex. A at 5-6)

Even after this recommendation, Plaintiff opposed arbitration of the grievance involved in the instant case, maintaining there was no agreement to arbitrate. Plaintiff then unilaterally submitted the issue of arbitrability to the arbitrator, in an attempt to attain a better result after having lost two court proceedings on the same issue and after having been found to have acted in bad faith by Magistrate Judge Gallas. In maintaining there was no CBA compelling arbitration, Plaintiff violated both this Court's refusal to enjoin arbitration of grievance #A-8712 and Judge Bell's original decision holding there was an interim agreement to arbitrate, which has since been affirmed by the Sixth Circuit Court of Appeals. ABSC v. UAW, No.93-3614, slip op. When the arbitrator decided there was no agreement to arbitrate, Plaintiff sought this Court's confirmation of the arbitration proceeding to which Plaintiff had protested every day of the hearing.

Defendant is entitled to an award of attorney fees to sanction Plaintiff for its wilful refusal to abide by the judicial process. The law states that a party may be awarded attorney fees if the other party has brought a meritless claim in bad faith. See Shimman, 744 F.2d at 1230. Here, in spite of the previous decision by Judge Bell holding there was an agreement to arbitrate, the Sixth Circuit's subsequent affirmation of

that decision and this Court's refusal to enjoin arbitration of the grievance, Plaintiff submitted to the arbitrator the issue of the existence of an agreement to arbitrate the grievance. This position of Plaintiffs that there is no agreement is unjustified and its continued litigation against the existence of such an agreement is in bad faith. The Court therefore grants Defendant's motion for award of attorney fees. (Docket No.27)

The Court further orders that by June 30, 1995, Defendant shall submit to this Court a well-verified and well-documented fee petition. Defendant shall, in writing its petition, consider the Sixth Circuit's holding in Jackson v. Law Firm of O'Hara, Ruberg, Osborne and Taylor, 875 F.2d 1224 (1989)[2] Thereafter, Plaintiff shall file any opposition to the petition by July 14, 1995.[3] No reply shall be permitted unless subsequently ordered by this Court.

VI. Conclusion

I In light of the foregoing the Court holds that because of Judge Bell's May 14, 1993. decision that there was a CBA between Plaintiff and Defendant, the doctrines of res judicata and collateral estoppel apply

---

[2] In Jackson, the Sixth Circuit held that "'a reasonable attorney's fee' does not necessarily mean actual legal expenses incurred." 875 F.2d at 1229.

[3] Plaintiff is reminded that its opposition shall be only to the categories of fees and costs and to the precise amounts, not to the issue (already herein decided) of whether fees and costs are appropriate.

and bar the parties from further litigating the issue of the existence of an agreement compelling arbitration of grievances Arbitrator Cohen's award will be vacated because it addressed this threshold question and ignored Judge Bell's decision on the matter, rather than resolving the merits of grievance #A-8712, which was the issue submitted to arbitration. The Court further orders that grievance #A-8712 be remanded to the AAA to a new arbitrator for a decision on its merits, because Arbitrator Cohen has already indicated his probable decision.

Finally, because of Plaintiffs bad faith in continuing litigation against the existence of a CBA despte Judge Bell's decision that such an agreement exists and despite this Court's refusal to enjoin arbitration of grievance #A-8712, the Court orders that Defendant be awarded attorney fees.

Plaintiffs motion (Docket No. 23) for confirmation of the arbitration award is hereby denied. Judgment accordingly.

Defendant's motion (Docket No.24) for vacation of the arbitration award is hereby granted. Judgment accordingly.

Defendant's motion (Docket No.27) for award of attorney fees is hereby granted, subject only to a determination as to the amount.[4]

---

[4] Following briefing, the Court will set the amount. At that time a separate Judgment will be entered relating solely to attorney fees

IT IS SO ORDERED.

/s/_____
David D Dowd Jr.
U.S. District Judge

DOWD, J.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

Aircraft Braking Systems Corporation,	)	
	)	
Plaintiff,	)	CASE NO. 5:94 CV 0496
	)	
	)	
vs.	)	
	)	
United Automobile, Aerospace &	)	
	)	JUDGMENT ENTRY
Agricultural Workers of America. UAW. et al.,	)	
	)	
Defendant.	)	

For the reasons set forth in the Memorandum Opinion filed contemporaneously with this Judgment Entry, IT IS HEREBY ORDERED, ADJUDGED and DECREED that the motion of Plaintiff Aircraft Braking Systems Corporation for confirmation of the arbitration award (Docket No. 23) is denied. The motion of Defendant United Automobile, Aerospace & Agricultural Workers of America, UAW for vacation of the arbitration award (Docket No.24) is granted. TheCourt orders that grievance #A.-8712 is remanded to a new arbitrator for a decision on the merits.

Plaintiff Aircraft Braking Systems Corporation ("ABSC") seeks to enjoin two separate arbitration proceedings before the American Arbitration Association ("AAA.") : 1) Grievance #A-8779, scheduled for a hearing on April 6, 1994; and 2) Grievance A#-8712, scheduled for a hearing on April 28, 1994. It also seeks, by separate motion, judgment on the pleadings on the grounds ot res judicata and collateral estoppel.

Having considered the parties' opposing positions, the Court temporarily enjoins the arbitration of Grievance #A-8779 (April 6, 1994), finding that the Stand Still Agreement between Local 856 and ABSC, dated January 12, 1993, remains in effect and prohibits this particular arbitration. The Court will consider lifting this injunction after the cross-motions for summary judgment filed in UAW Local 856, et al. v. Loral Corp., et al., Case No. 5:92 CV 2391, are decided. The Court anticipates a ruling on these motions by no later than the end ofApril, 1994.

The Court will not enjoin the arbitration of Grievance #A-8712 (April 28, 1994)

In view of the ruling on plaintiff's motion for injunctive relief, defendant's motion for judgment on the pleadings (Docket No. 14) is denied.

IT IS SO ORDERED.

/s/_____
David D Dowd Jr.
U.S. District Judge

Dowd, J.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

Aircraft Braking Systems Corporation, Plaintiff,	)	CASE NO. 5:94 CV 0496
vs.	)	ORDER
united Automobile Aerospace,Agricultural Implement Workers of America, et al, Defendants.	)	(Disposing of Docket Nos. 6 and 14)

on April 1 1994, the Court conducted a hearing on plaintiff's motion for preliminary injunction (Docket Nos. 6, 17) - All parties were represented and heard. In addition, the defendants' motion for judgment on the pleadings (Docket No. 14) is before the Court. As stated below, the motion for preliminary injunction (Docket No. 6) is granted in part and denied in part. The motion for judgment on the pleadings (Docket No. 14) is denied.

Case closed

IT IS SO ORDERED.

/s/_____
David D Dowd Jr.
U.S. District Judge

AMERICAN ARBITRATION ASSOCIATION

----------x

In the Matter of
the Arbitration

ARBITRATOR'S
OPINION

GRIEVANCE:
ARBITRABILITY
--SUBCONTRACTING
AAA 53 300 00600 93

-between-

AIRCRAFT BRAKING SYSTEMS CORP.

--and-

INTERNATIONAL UNION OF UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL 856

----------x

FOR THE COMPANY:

MURRAY W. PORTNOY
Labor Relations Consultant
Portnoy Messinger Pearl &
Associates, Inc.
7001 Brush Hollow Road
Westbury, New York
11590

FOR THE UNION:

BOB KRUNICH

Chariman, Executive
Bargaining Committee
UAW, Local 856
1155 George Washington
Boulevard
Akron, Ohio 44312

DATES OF THE HEARING:

April 28, July 27, July 28
and September 20,
1994

PLACE OF THE HEARING:

Holiday Inn, Arlington
Road,
Akron, Ohio 4/28/95
AAA Middleburg Heights,
Ohio
7/27, 28, 1995
Hilton Inn, Fairlawn, Ohio
7/20/95

ARBITRATOR:

HYMAN COHEN, Esq.
Impartial Arbitrator
Office and P. O. address:
Post Office Box 22360
Cleveland, Ohio 44122
Tel: 216-442-9295

* * * * *

The hearing was held on April 28, July 27, July 28 and September 20, 1994 before HYMAN COHEN, Esq., the Impartial Arbitrator selected by the parties pursuant to the Rules and Regulations of the American Arbitration Association Post-hearing briefs were submitted on November 18, 1994

* * * * *

Over the course of many years, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, and its Local No. 856, U.A.W., the Union" and AIRCRAFT BRAKING SYSTEM, the "Company", and its predecessors, have been parties to a series of successive collective bargaining agreements On or about September 11, 1991, the Union filed a grievance with the Company in which it protested the Company's violation of the Recognition and Subcontracting clauses of the "August 10, 1991 implemented Contract" and "past practice".

The parties entered into a Labor Agreement, effective October 31, 1988 which was to remain in force until 6:00 p.m., August 10, 1991. Under Article XIV, Section 1 of the Agreement, its terms may continue "for additional periods of one (1) year thereafter, with the provision that should either party desire to terminate the Agreement * *"., notification is to be given to "the other party in writing not less than sixty (60) days prior to the expiration date or the end of any subsequent yearly period * *."

Pursuant to Article XIV, Section 1 of the 1988 Agreement, the parties sent termination notices to each other in late May and early June, 1991. In June, 1991, the parties commenced negotiations for the purpose of entering into a new Labor Agreement.

Negotiations between the parties continued during July, 191, without an agreement by the parties. At a collective bargaining meeting that was held on August 10, 1991, the Company submitted its "final

proposal on all economic and noneconomic issues". It is undisputed that the Union acknowledged receiving the Company's final proposal on August 10, 1991, after which the meeting ended. As it indicated in its final proposal, the Company implemented its "terms and conditions", effective 6:01 p.m. on August 10, 1991.

Before the Company implemented its final offer, it rejected the Union's request for a day to day extension of the previous Labor Agreement. As Director, Human Resources Edward Seine indicated, "* * we did not believe there was any value in agreeing to a day-to-day extension. We had presented our best and final offer, and we would "proceed to implement our best and final offer".

The Company's "Final Proposal On All Economic and Non- Economic issues", in relevant part, provides:

> "Effective 6:01 PM August 10, 1991 the following terms and conditions shall be implemented:
>
> The Contract between U.A.W., Local #856 and Aircraft Braking Systems Corporation which by its terms expires at 6:00 PM August 10, 1991, is hereby extended and renewed for a period of three years from August 10, 1991, or the date of ratification whichever is later except as specifically amended hereafter.* *"

The Final Proposal contained fourteen (14) provisions. The last provision contained the following terms:

> "All Company proposals dated June 20, 1991, and all tentative agreements will be incorporated into the Basic Labor Agreement; Pension, Insurance and Service Award Agreement; and Supplemental Unemployment Benefit Agreement and addendum letters as appropriate, except as modified by the attached Company proposals."

The evidentiary record establishes that the bargaining unit employees were dissatisfied about the Company's final offer. When the employees came to work the week after August 10, 1991, "there was a lot of screaming, yelling by the employees".

The employees wore shirts setting forth the letters "FYLO". The evidence indicates that the acronym means either "Forget your Last Offer" or "F-k Your Last Offer". The acronym was also painted on different machines and walls of the plant.

The word "solidarity" was printed on the shirts worn by many employees. The employees also brought into the plant hand stickers that made "different types of noise".

Employees were offered the opportunity to work 10 hours or "doubles". Less than ten (10) employees accepted the offer by the Company. Of the ten (10)

employees Williams indicated "maybe three (3) or four (4) employees worked a double shift".

Before August 10, 1991, in situations involving an "emergency", 25 or 30% of roughly more than 600 employees would show up and work on Saturday and Sunday. With respect to "posted overtime", before August 10, 1991 approximately the same number of employees that would work weekends would show up for the posted overtime. After August 10, less than ten (10) employees accepted overtime.

Vice President of Manufacturing, Williams indicated that "around the third or fourth weekend of August, 1991" the Company "declared an emergency * *". The Company "called the Union on Saturday morning" and indicated that there were not enough people to keep the machines running * *." As a result, salaried employees were assigned to work in the machine shop.

Williams indicated that software programs "were taken and thrown in the trash". What remained was "the tooling" This meant that "a programmer" would have to "come in, restructure and reset up the program, which * * could be anywhere from eight (8) hours to a couple of days, depending on the type of operation".

Williams described the activities of the employees after August 10 as a "slowdown". According to Williams, after August 10 management

began "looking at individuals throughout the shop" and their work "performance".

When management saw repeated efforts of deliberate slowdown" some of the employees were suspended, and in some cases, employees were discharged. After suspending some employees Williams said, the Union issued a letter, which he had seen that in effect, stated: "We want you to go to work and stay at your job assignment and continue to perform your job". Approximately thirty-three (33) employees were suspended or discharged for "participating in a slowdown and disruptive behavior".

The Company presented undisputed testimony on the decline in efficiency between April, May and June, 1991 as compared to the weeks between August 10 and August 31, 1991. Between April through June, 1991, on the average, efficiency for the shop was 76%. From August 10 until the end of the month, efficiency declined to below 63%.

It should be noted that the term "efficiency" was explained at the hearing by Manager of Industrial Engineering Thomas Strauch, as representing "direct labor which is the labor of workers actually working on the [Company's] product in the shop against the standards that have been created by the Industrial Engineering Department".

The drop in efficiency, according to Strauch cost the Company approximately $200,000 a week. Strauch provided testimony on how he arrived at this cost. He indicated that employees had been working on the average 9,940 direct hours a week in the shop.

Because of the drop in efficiency from a 78% average for the year to the 63% level, the Company was required to spend an extra 2,367 hours a week in order to accomplish its workload objectives.

Strauch indicated that it costs the Company about $125 an hour to run the shop. This hourly figure includes not only direct labor but other elements of manufacturing support. As a result, the extra 2,367 hours a week 'translates into $295,000 a week". Thus for the three (3) weeks in August, 1991 that efficiency was down, it cost the Company approximately $300,000 a week or close to 'a million dollars'.

In light of these circumstances I turn to consider the events leading up to the subcontracting or outsourcing" of "cups" by the Company, which prompted the Union to file the instant grievance. The nature of the cup which was a "major product line" of the Company before August 10, 1991 was described by Director of Materials Scott A. Shannon:

> * * The cup is a metal object that can range from 2 to 3 inches in diameter. The cup's basic purpose is to hold a metallic material which is called a sintering material. It holds the sintering material, which makes a lining. The lining is then produced and riveted onto a steel disc, which is then assembled into an aircraft brake. That cupholds the metallic materials to aid in the stopping of a brake, to act as a friction material" * *.

When a manufacturer designs the aircraft, the Company produces the only qualified equipment that the airlines are permitted to place in their aircraft. If the product, namely, the cup is not available for the aircraft, the aircraft is grounded. The Company "certifies that aircraft can fly anywhere from 300, 400 landings" before a lining, which contains the cup, is required to be changed.

It should be noted that the Company does not manufacture the "entire friction apparatus" for the brakes. The Company produces the cup. Raw material is purchased from an outside supplier which is put in a press and formed. Cups are then delivered to a sintering supplier who puts friction material inside the cups and returns the cups to the Company.

According to Williams, in light of the events which occurred at the Company's facilities during the week that followed the August 10, 1991 implementation by the Company its final offer, he recommended to Director, Human Resources, Edward Searle that the cups should be outsourced. As Williams testified:

> After going through this for about a week, not having what I consider any indicator that this thing was going to be short-lived, we started looking at what do we do, how do we make sure were in a position to deliver product to our customers.
>
> We looked at the press room, we looked at our machine shop, all of our processes

> internal. We looked at what can we do, how can we perform, what's your efficiency today, what's the output? We looked at specific operations that we thought, based on the aspect of process in-house and outside and the type of commitment that we had, that for these particular part numbers I made a recommendation to Ed [Searle] * * -- that we talk to the union about outsourcing the parts."

On August 19, 1991, Searle sent a letter to Chairman, Executive Bargaining Committee D. G. Hurr, in which he indicated that the Company will be ontsourcing work in order "to meet customer obligations".

Director of Material, Scott A. Shannon was assigned to find a supplier that would have the capacity and capability to produce the cup. According to Shannon, a supplier was found which could manufacture the cup. The supplier was Logan Metal Stamping which is owned by the Hawk Group. The Hawk Group also owns the Company's sintering supplier, Friction Products.

According to Shannon, Logan Metal's "concern" was that if "it was only going to be a short term proposition", it would not enter into a contract with the Company. Their "concern" was due to the costs which would be incurred because of modifications to the dies and some of the "tools-to-boom" - if there was a long term

commitment by the Company, Logan Metals agreed to absorb the costs for the modification of the tools. Accordingly, the Company entered into an agreement with Logan metals for three (3) years.

In its catalogue, the Company commits itself to make deliveries of the cups to aircraft in 30 or 60 days. Toni Pastors, who was the Company's buyer in August, 1991, described the "lining cups" as "a large high volume" product which generates "a lot of dollars".

Pastor indicated that the three (3) year agreement was entered into with Logan Metal because the Company was "kind of over the barrel". The Company, she said needed an all out effort to have the dies up and running as soon as possible ° °." Pastor added that "it was an enormous effort on their [Logan Metal] part or they wouldn't agree to do the work".

The three (3) year agreement with Logan Metal expired in September, 1994, according to Pastor. Pastor said that there was never a signed agreement with Logan Metal. Shannon indicated that the three (3) year agreement was based upon a purchase order with Logan Metal. As Shannon indicated, "To me, a purchase order is a contract".

On August 10, 1991, roughly 650 to 700 bargaining unit employees were employed by the Company. As of the date of the hearing in July, 1994 there were less there than 400 bargaining unit employees working for the Company.

Before August 10, 1991 the Company sold about 200,000 cups a month to various airlines. At the time of the arbitration hearing, the monthly sales of cups had decreased to approximately 600,000 cups a month.

It should be noted that the Press Operators in the Press Room had performed the work that was required on the cups. Williams indicated that "there was no layoffs in the Press Room pertaining to the cups". It is undisputed, however, that seven (7) Press Operators were laid off, effective October 4, 1991 (two (2) Press Operators) and January 10, 1992 (five (5) Press Operators).

Williams indicated that the "slowdown" by the employees ended "around the middle of September, 1991". In Searle's opinion productivity and working overtime returned to normal "sometime in late 1991, October, November, 1991". In December, 1991, the Company offered those employees who were suspended and terminated to be reinstated effective January 1992.

Since outsourcing the cups on or about September 9, 1991, the Company has not manufactured the product. The evidentiary record indicates that in order to manufacture the cups, the Company would be required to modify the dies to fit the presses of the Company. In order to manufacture the cups the Company would incur the "associated costs of packaging" and the "carrying costs of inventory".

Moreover the Company does not possess the technology to perform the packaging. Other related savings from not manufacturing the cups include the costs of procuring steel and the inspection of steel. Shannon estimated that the Company would have to incur costs of $50,000 to $75,000 to begin manufacturing the cups.

DISCUSSION

I

ARBITRABILITY

The Company raises a threshold issue which must be resolved before any consideration can be given to the merits of the instant dispute. The Company contends that it has no duty to arbitrate the instant grievance because there is no agreement to do so.

The grievance that was filed by the Union protests the Company's violation of the subcontracting terms under Article X, Section 12 of the Company's final offer, which provides as follows:

> • • Section 12. Subcontracting The Company and the Union agree in the principle of maintaining as much work in its Akron facilities as practical.
>
> (a) The Company agrees to notify the Union 30 days in advance of any work to

be subcontracted that has not been subcontracted in the past.

(b) The Company will retain the right to continue subcontracting so long as it does not do so for the purpose of abolishing jobs;

(c) or for the purpose of abolishing work customarily or normally performed by the employees * *."

The Company's final offer also contains a grievance procedure which culminates in arbitration and a no-strike or lockout clause.

I.

IMPLEMENTATION BY COMPANY OF ITS FINAL OFFER

Before enumerating the fourteen (14) provisions or amendments the Company's final offer provides as follows:

Effective 6:01 PM August 10, 1991 the following terms and conditions shall be implemented:

The Contract between U.A.W. Local #856 and Aircraft Braking Systems Corporation which by its terms expires at 6:00 PM August 10, 1991, is hereby

> extended and renewed for a period of three years from August 10, 1991, or the date of ratification whichever is later except as specifically amended hereafter. * *"

The Union contends that under these terms an "implied or 'interim agreement' exists between the parties until the Union membership ratifies the contract between the parties. Since the Union had not ratified the contract by September 20, 1994, the last day of the hearing, the Union claims that so long as the bargaining unit employees perform their job duties, they do so under an "implied" or "interim agreement". Thus the "agreement" is indefinite until ratification I disagree with the Union's interpretation of the phrase in question.

It should be underscored that the Company's final offer came into existence after several undisputed events occurred. The parties began negotiations roughly in mid-June, 1991. They were unable to reach an agreement. As a result of an impasse in negotiations,the Company implemented its final offer at 6:01 pm o August 10, 1991. It is undisputed that the 1988 contract expired at 6:00 p.m on August 10. Moreover, he Company implemented its final offer after rejecting the Union's request for a day to day extension of he 1988 contract

In light of these circumstances the intent and meaning of he language is clear. The initial terms of the final offe are self-explanatory: "Effective 6:01 p.m., Augst 10, 1991 the following terms and

conditions shall be implemented". It must be emphasized that this statement constitutes a unilateral declaration by the Company with respect to the implementation of the terms and conditions of its final proposal.

The Company's final offer goes on to indicate that as provided in the contract between the parties, that is to say, the 1988 contract which expired at 6:00 p.m., August 10, 1991, it is "hereby extended and renewed for a period of three (3) years from August 10, 1991, or the date of ratification whichever is later " ". Again, these terms constitute a unilateral declaration by the Company. Since the Union has not ratified the Company's final offer, its terms and conditions as well as the fourteen (14) amendments are extended and renewed Had the Union ratified the Company's final offer the terms and conditions of the final offer would have been extended and renewed from the date of ratification, rather from August 10, 1991 since by necessity the date of ratification would have been later than August 10.

The Union reads the phrase to mean that until its membership ratifies the terms and conditions which it had not done by September 20, 1994, its bargaining unit employees have been working under an "implied" or "interim agreement.

If such an "implied or "interim agreement" existed, there would be no reason to require the Company's final offer to be ratified by the Union membership.

There is no basis in the record to conclude that the terms of the preamble [the initial paragraph] in the Company's final offer constitute an "implied" or "interim agreement" which continues indefinitely until the Union ratifies the final offer. The terms of the preamble is the Company's unilateral declaration that it was implementing the terms of its final offer which was extended and renewed for three (3) years from August 10, 1991 or the date of ratification, whichever [was] later". The initial statement of the Company's final offer does not constitute an "implied" or "interim agreement".

It was precisely because the parties were unable to reach an agreement that the Company implemented its final proposal. Since the Union has claimed that there was an "implied" or "interim agreement" it would be useful to consider the nature of an agreement or a contract.

Under familiar principles of contract law, a contract arises from offer and acceptance. It is undisputed that the Company implemented its final offer on August 10, 1991.

In order to establish an "implied" or "interim agreement" the Union must establish that it accepted the Company's final offer. It must do so because the Union seeks to arbitrate a grievance in which it protests the Company's violation of the subcontracting clause which is contained in Article X, Section 12 of the Company's final offer.

It is well established that arbitration is a creature of contract. The Company is not compelled to

submit a dispute to arbitration if it has not previously agreed to do so. As the Supreme Court observed in *John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964).

> "• • • just as an employer has no obligation to arbitrate issues which it as not agreed to arbitrate, so *a fortiori*, it cannot be compelled to arbitrate if an arbitration clause does not bind it all". At page 547.

Accordingly, by proving that it accepted the Company's final offer, the Union would also establish the existence of a contractual duty by the Company to arbitrate the instant dispute. The Union did not sign the Company's final offer. Nor, was the Company's final offer submitted to the Union membership for a vote on ratification. Clearly, there is nothing in the Company s final offer which establishes that the Union accepted the final's offer.

In *Westwood Products, Inc.* 77 LA 396 (Peterschmidt, 981) the Arbitrator put it this way: "Then when the Union asserts that the Employer has a contractual duty to arbitrate, it must prove the assertion", at page 397. By asserting that an "implied" or "interim agreement" exists does not make it so. Having concluded that the preamble, in and of itself does not establish an "implied" or interim agreement, I turn to consider the additional arguments and evidence submitted by the Union with respect to the issue of arbitrability.

a. EMPLOYEES CONTINUED TO WORK FOR COMPANY AFTER 6:01 P.M. ON AUGUST 10, 1991, AND DID NOT GO OUT ON STRIKE

Before proceeding to consider the Union's claim that the employees continued to work under the Company's offer and did not strike, a brief summary of the principles of national labor law would be instructive. After the parties have bargained in good faith and reached an impasse, the principles of federal labor law are clear on the actions that may be taken by the parties. Both the Company and the Union may resort to the use of economic power. The Arbitrator in *Sycon Corp.*, 87 LA 206 (Abrams, 1986) stated: "As long as the parties fulfill their legal obligation to bargain in good faith they are free under national labor law to exercise their economic power in an attempt to win concessions from the other side". At page 208. In *H.K. Porrer* v. *NLRB,* 397 US 99 (1970), the Supreme Court stated:

> """* * But the Act (National Labor Relations Act) as presently drawn does not contemplate that unions will always be secure and able to achieve agreement ever when their economic position is weak, nor that strikes and lockouts will never result from bargaining to impasse. It cannot be said that the Act forbids an employer or a union to rely ultimately on its economic strength to try to secure what it cannot obtain through bargaining."

In light of these considerations, I turn to consider the testimony of the Union's witnesses, who claimed that an "agreement" or "contract" has existed with the Company since August 10, 1991. Greg Megois, an Inspector, who is on the Union's Executive Bargaining Committee said that as long as the employees work under the "interim agreement" the Union is not free to strike. It is true that since August 10, 1991, the bargaining unit employees have continued to work for the Company.

Working, in and of itself under the Company's final offer does not establish that there is an "agreement" between the parties. In *Westwood Products,* a similar claim was asserted by the Union, namely, that working under the terms of the Company's implemented offer requires the Company to arbitrate a dispute, as provided by the offer. The Arbitrator in *Westwood Products* rejected the Union's claim and stated:

> "Basically the Arbitrator accepts the position of the Employer in that since no collective bargaining agreement exists between the parties, no obligation to arbitrate grievances exists. The prior contract had expired; the obligation to arbitrate disputes expired with it. The Union specifically rejected the Company's final offer and while ernployees continued to work for wages listed in that offer, the working arrangement constituted a new

agreement only insofar as he Employer offered.

> Contracts arise from offer and acceptance. That is fundamental contract law. When an offer is rejectcd, that action cancels the offer completely. Thus the the Union has no rights under the rejected offer itself--only the rights proffered by the Employer in the manner the Employer chooses * *." At page 399

These observations by the Arbitrator in *Westwood Products* are applicable to the instant case. While employees continued to work after 6:01 p.m. on August 10, 1991, they did so under the Company's implemented final proposal. The employees worked under the Company's terms and conditions. These terms and conditions serve the purpose of work rules which are unilaterally adopted and implemented by the Company. Thus working under the Company's final offer does not constitute acceptance of the Company's final offer.

Moreover, Megois' statement that as long as the employees work under the Company's implemented offer which he characterized as an "implied agreement", the Union was not free to strike. If there is a fundamental principle in the area of labor relations, it is that employees cannot strike while they also work for an employer. A strike, simply, is a concerted cessation of work. Accordingiy, while the employees worked under the Company's implemented final offer, there was no strike. However, working

under the implemented final offer does not constitute acceptance of the Company's offer.

J ack Eldreth, a bargaining unit member said that the Company's final offer was an "imposed contract". This phrase contains mutually repugnant terms. A contract is based upon the mutual consent of both parties. There is no evidence that the Union consented to the Company's final offer. As I have already stated, to merely work under the Company's final offer does not constitute an acceptance of the offer

Eldreth acknowledged that he remembered that the employees "were mad because the Company stopped negotiating and imposed its own term's and conditions without an agreement". Moreover, the following cross-examination of Eldreth is illuminating in establishing that the Union did not accept the Company s final offer.

> "* *Q. Did they give you a copy of any collective bargaining agreement between the company and the union?
>
> A. An agreement?
>
> Q An agreement, contract.
>
> A I don't think I have it. I may have it in my desk. I might have it with me.
>
> Q Did they give it to you today?
>
> A. No, no.

Q. Did the union say to you, "We have a contract with the company signed contract"?

I\ I haven't seen it.

Q. Have you ever seen a signed contract?

A. No, sir, I have not.

Q. After August 10th, did you ever go to the meeting to ratify a contract?

A. We went to one down on Massillon Road or Arlington.

* * * *

Q. You had a ratification meeting?

A. Yes, around that date.

Q. Did you ratify a contract?

A. No, we did not.

Q. Did you vote on it?

A. No.

Q. Didn't even vote on it?

A. No, sir.

Q. Did the union bring you a contract to vote on at all?

A (No audible response.)

Q. If they did, you didn't see it.

Is it your opinion that there is a collective bargaining agreement that exists between the local and the company?

Q. Is there a contract, an imposed contract?

Q. Imposed contract

A. Yes.

Q. Do you know if the union ever agreed to that contract?

A. Did they sign to agree to it?

Q. Did they sign off of it?

A. Sign off to agree to it, no. * *."

Don Hurr, Chairman of the Unions Executive Bargaining Committee, was present at the August 10, 1991 meeting when the Company's finaL offer was implemented. The following exchange on cross-examination between the Company's representative and Hurr is of great weight.

"Q. When that meeting ended, did it end in reaching an agreement? Did we reach an agreement at the end of that meeting on August 10th?

A. Did you reach an agreement?

Q. Yes.

A. No, you imposed a contract * *."

Burr indicated that various provisions of the Company's final offer or the "contract" were improperly or prematurely implemented because the Union had not yet ratified the final offer. Thus, after August 10, Hurr said that the Union has "challenged" the implementation of various terms of the contract

Implicit in Hurr's testimony is the Union's position that there is an "agreement" or "contract" before ratification, and there is a different "agreement" or "contract" after ratification. Since the Union has not ratified the Company's final offer or signed off on the final offer it is difficult to comprehend the nature of Hurr's characterization of the final offer as an "agreement" or "contract". It is sufficient to state that there is no evidence that the Union accepted the Company's final offer. Working under the Company's implemented final offer does not establish acceptance of the offer by the Union. Absent acceptance, there has been no such agreement between the parties.

Hurr said that the Union "had a ratification meeting, and they chose not to vote on the contract but to go back to work under it while we tried to work things out". Accordingly, the Union membership chose not to vote on the Company's final offer and chose to work under the Company's unilaterally implemented work rules.

b. UNION'S RIGHT TO STRIKE

In light of the Union's assertion that a 'contract", "implied" or interim agreement has been in effect with the Company it would be useful to consider whether the Union has the right to strike.

The duty to arbitrate is the quid pro quo for a no strike clause in a collecuve bargaining agreement. *Textile Workers Union v. Lincoln Mills,* 353 US 448 (1957). After expiration of the collective bargaining agreement, unless the grievance is based on a right that arguably had accrued or become vested under the agreement prior to its termination, the grievance is not arbitrable. *Nolde Bros. Inc. v. Local No. 358, Bakery & Confectionery Workers Union,* 97 S. Ct. 1067 (1977).

The instant grievance arose after the 1988 contract expired and after an impasse in negotiations. More precisely, the instant grievance arose during the implementation of the Company's final offer. Thus, the Union is no longer bound by a no-strike clause. If the Union can strike, it is highly unlikely that the company would intend to submit a dispute to arbitration.

must be underscored that arbitration decisions are final and binding. The scope of review by the judiciary is extremely narrow. See, e.g., *Paperworkers v Misco., Inc.*, 484 U.S 29 (1987). Thus, unless there is convincing evidence to the contrary, it isimprobable that the Company would agree to submit a dispute to final and bind arbitration if the Union retained its right to strike.

Before proceeding further, it should be noted that the Company cannot compel the Union not strike, given the facts and circumstances which have been presented in this case. Hurr, in fact, acknowledged that he was unaware as to how the Company can prohibit the Union from taking strike action in the absence of the Union signing off on the Company's final offer.

It is significant that none of the Union's witnesses indicated that the no strike clause in the Company's final offer, which was identical to the no strike clause in the expired contract was applicable to their present situation. International Representative Roger Bernardez referred to another provision of the Company's final otter, namely Article XIV, Section 2 of the Company's final offer which he said provides the Union with a right to strike. Article XIV, Section 2 provides as follows:

"Section 2. Negotiations

> Negotiations upon such proposed amendments or changes of the terms of this Agreement covered in the notices

> of desire to amend shall begin not later than 50 days prior to the expiration date of the expiration date of any subsequent yearly period and shall continue, until agreement is reached, or the contract terminated, and during said negotiations this Agreement shall remain in full force and effect, except that in the event negotiations are continued by mutual agreement beyond the appropriate expiration date, either party may, at any time thereafter, terminate this agreement on 10 days notice to the other party".

Relying upon this provision of the Company's implemented final offer, Bernardez said that "either party can terminate the agreement within ten days' notice". He went on to indicate that if the Union gives the Company a ten (10) day notice it has the right to strike; should the Company provide the Union with ten (10) days' notice under Article XIV, Section 2, the Company can lockout the employees.

Before considering the merits of Bernardez's interpretation of Article XIV, Section 2, it must be pointed out that the identical terms were contained in Article XIV, Section 2 of the expired 1988 contract. That Article XIV, Section 2 is the same in both the expired contract and the implemented offer is not surprising.

It is a basic principle of federal labor law that after an impasse in bargaining has been reached, an

employer is free to implement the terms of the final offer. See, e.g. *NLRB* v. *Katz*, 369 U.S. 736 (1962). As a result, the provisions of Article XIV, Section 2 of the Company's final offer are identical to Article XIV, Section 2 of the expired contract. As a corollary to this basic principle it is also irrelevant that the Company's final offer which it unilaterally implemented, contained arbitration and no-strike clauses which were included in the expired contract.

Bernardez [as well as Hurr] indicated that Article XIV, Section 2 of the Company's final offer was applicable to the "agreement" that had been in effect since August 10, 1991. Bernardez indicated that the parties have held several meetings between August 10, 1991 and the beginning of 1994 which were negotiating sessions.

One such meeting, held on June 26, 1992 took place at the request of Hurr. A memorandum of Agreement signed on July 16, 1992 by Searle and the members of the Union Bargaining Committee along with Bernardez, in relevant part, stated as follows:

"MEMORANDUM OF AGREEMENT

> Memorandum of Agreement between Aircraft Braking Systems Corporation (the Company and International Union United Automobile, Aerospace and Agricultural Implement Workers of America and its Local 856 (the "Union"):

1. At the request of Donald Hurr, Chairman of the Union's Bargaining Committee, a meeting was held between Donald Hurr and Edward L. Searle, Director of Human Resources for the Company, on June 26, 1992 at which Mr Hurr stated that certain items must be clarified between the contract implemented by the Company can be ratified. As a result of that meeting, the parties agree as follows:

A. The Union agrees to all of the terms and conditions of the implemented contract imposed by the Company on August 10, 1991 with the exception of the following items:

(i). Funding of S.U.B. plan

(ii). Changes to Comprehensive Medical during life of the Agreement; amount of contributions for Comprehensive Medical contributions by retirees for Comprehensive Medical; and reimbursement for Medicare.

(iii). Effective date of 401 (k).

(iv.) Length of suspensions (Article IV, Section 5, Paragraph 192).

(v.) Skilled trades subcontracting (Article II, Section 25, Paragraph 148)

(vi.) Effective date of Agreement. * *"

Thus, the Memorandum of Agreement indicates that at Hurr's request the parties met to "clarify six " items before the contract implemented by the Company can br ratified". The Memorandum goes on to provide that the Union agrees to all of the terms and conditions of the implemented contract imposed by the Company on August 10, 1991 except for six (6) enumerated items.

The reasonable inference to be drawn from the Memorandum of Agreement is that, in fact the Union has not agreed to the "contract implemented" and "imposed" by the Company since August 10, 1991. Moreover, agreement by the Union was conditional upon the "clarification" of the six (6) enumerated items.

Paragraph 1. E. of the July 16, 1992 Memorandum provides as follows:

> "This Memorandum of Agreement shall lapse by its terms thirty (30) days from the date of execution, at which time if the parties have reached no agreement hereunder, the parties shall revert to their respective postures as of July 1, 1992". #10

The "respective postures of the parties as of July 1, 1992" was that the bargaining unit employees worked under the Company's implemented final offer.

It is obvious from the July 16, 1992 Memorandum that the Union did not accept the Company's offer. Furthermore, the reasonable inference to be drawn from the Memorandum is that the Union would not accept the Company's final offer until ratification. And ratification by the Union membership would not materialize until the six (6) "items" were "clarified to the satisfaction of the parties".

In any event, Article XIV, Section 2 of the 1988 contract expired as of 6:00 p.m., August 10, 1991. Article XIV, Section 2 is merely a clause of the Company' final offer, indeed, by its terms, the provision is irrelevant to the instant dispute and has no bearing on the issue of arbitrability. Clearly, the terms of Article XIV, Section 2 have not been applicable to the parties since 6:01 p.m. on August 10, 1991. Accordingly, the Union did not give up its right to strike which is well established as the quid pro quo for the Company's agreement to arbitrate disputes.

II.

ORDER OF UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

In 1993, the Company sought an injunction in the Eastern Division of the United States District Court, Northern District of Ohio, against a pending arbitration proceeding and the Union filed a counter-claim seeking an order compelling arbitration.

The action by the Company resulted from a grievance filed by the Union on September 3, 1991 in which it claimed that the Company violated its unilaterally implemented contract because it refused to pay a bonus as provided in Paragraph or Amendment "3" of the Company's Final Proposal On All Economic and Non-Economic Issues that was implemented on August 10, 1991 at 6:00 p.m.

The District Court Order denied the Company's motion and granted the Union's motion. The Court held that [1]"an agreement to arbitrate does exist and the instant grievance is within the terms of the arbitration agreement". Accordingly the Court ordered the Company to submit the grievance filed by the Union to binding arbitration pursuant to the Company's implemented final offer.

It is important to distinguish between the Court's role and the role played by the Arbitrator with respect to the issue of arbitrability. The distinction was explained by the Arbitrator in *Sycon Corp.*, 87 LA 206 (Abrams, 1986).

> ~]t is important to distinguish the role of a court in a suit to enforce arbitration and the role of the arbitrator ruling on an issue of arbitrability. The court's job is to send the parties to arbitration unless it is clear that they had agreed not to arbitrate a matter. By comparison, when an arbitrator is asked to decide whether a matter is arbitrable, he or she should not apply a presumption.

> Arbitrators who have stated that parties must be presumed to have intended that their procedure have a broad reach are confusing their job as "contract reader" with the court job of "arbitration facilitator". The arbitrator must examine the terms of the parties' agreement to determine what they actually intended. The language of the agreement (interpreted if it is ambiguous in light of past practice and bargaining history) will indicate if they intended that all matters would be arbitrable, or that a presumption would be applied in favor of arbitrability, or that matters which arise after the expiration of an agreement can be arbitrated under the terms of the expired agreement. * *"
> At page 208

As I have previously indicated, the instant grievance arose after the expiration of the parties' collective bargaining agreement and after they bargained to impasse. Clearly, the grievance arose under the Company's implemented offer.

The Court's order is not binding upon this Arbitrator. Were I to comply with the Court's order I would have to ignore the evidentiary record in this case. In other words, I would be abdicating my role as an Arbitrator in determining the intent of the parties based upon the evidentiary record.

Having established my appropriate role in this dispute, I would be remiss in not considering Searle's letter dated August 16, 1991 which was sent to Hurr and, in part was relied to by the District Court Judge in issuing the order to arbitrate. In his letter, Searle stated:

> You are hereby notified that Aircraft Braking Systems employees engaging in any actions involving a sit-down, stay-in, slow-down, or any curtailment of work, or restriction or interference with production are in direct violation of Article V of the Basic Labor Agreement. Any employees engaging in such act will be terminated in accordance with the Basic Labor Agreement.
>
> Also, in the event such incidents occur the Company will demand arbitration to determine to what relief the Company is entitled including including monetary damages."

At the hearing before the District Court Judge, Searle indicated that the arbitration clause was "put in place when we implemented the final offer". However, it should also be underscored that Searle indicated in his August 16, 1991 letter that employees engaging in the actions which he described in his letter, were in direct violation of Article V of the Basic Labor Agreement" and "will be terminated in accordance with the Basic Labor Agreement". Article V contains the no strike provisions.

The reasonable inference to be drawn from Searle's August 16, 199I letter is that the arbitration clause was the quid pro quo for the prohibition on the Union's right to strike. Thus, Searle referred to the actions of the employees which were "in direct violation of Article V". Article V contains the no strike clause. As he indicated in his letter", in the event such incidents occur the Company will demand arbitration* *."

As I have previously indicated, the evidence in this case establishes that under the implementation of the Company's final offer, the Union, in fact, has not given up its right to strike The Union's witnesses have consistently stated that as long as the employees work under the Company's final offer they will not strike.

As I have indicated already, employees cannot work and strike at the same time, inasmuch as a strike is a concerted cessation of work. Thus, the statement by the Union's witnesses that as long as the employees work there will be no strike action, is meaningless.

In addition, the Union's witnesses, [especially Bernardez] indicated that on ten (10) days notice under Article XIV, Section 2, the negotiations clause, the Union can strike and upon ten (10) days notice the Company can lockout. The reasonable inference to be drawn from a careful evaluation of the testimony of the Union's witness is that the Union has not given up it right to strike and is not bound by the

no-strike clause of the implemented final offer of the Company.

It is obvious that in writing the August 16, 1991 letter to Hurr, Searle was mistaken in believing that the Union was bound by the no strike clause. Accordingly, his reference to arbitration was not based upon consideration and is unenforceable.

The fact is that the Company has not voluntarily submitted any dispute to arbitration since August 10, 1991. Bernardez acknowledged that except for an arbitration which took place pursuant to the Labor Board's deferral policy, the Company has consistently taken the position that it will not implement the "arbitration provision".

CONCLUSION

Ihave carefully read the decision and award in the arbitration between the parties with respect to the issue of lump sum payments, that was issued on September 27, 1993 (AAA No. 53 30 300 00073). It should be noted that the instant evidentiary record is different than the record before the Arbitrator in the previous hearing.

In addition, with respect to whether the Company is bound to arbitrate, my analysis has been based upon well established principles of arbitration and familiar principles of national labor law. The September 27, 1993 decision is of no persuasive value in arriving at the threshold decision in this case. It

should also be noted that the Company has filed an appeal to overturn the arbitration decision that was issued on September 27, 1993.

The conclusion that no "implied" or "interim" agreement exists between the parties is reinforced by the conduct of the employees subsequent to August 10, 1991. The evidentiary record establishes that the bargaining unit employees refused to work overtime, worked "strictly to contract, engaged in disruptive conduct and caused efficiency to decline. Such behavior continued until late September or October, 1991.

The conduct of the employees was due to their hostile negative reaction to the Company's final offer. Thus, the shirts worn by the employees indicated "FYLO" which indicates "Forget Your Last Offer" or "F--K Your Last Offer"

Further evidence that the Union did not accept the Company's final offer is the sign that was placed on a billboard close to the plant which indicated the following;

"Hey LORAL/ABS...UAW 856
NEEDS A FAIR LABOR CONTRACT.
FORGET YOUR LAST OFFER
Paid for by the UAW Local 850"

Hurr's testimony with respect to the sign merely provides further compelling evidence that the Union did not accept the Company's final offer:

> "* *Q. Do you remember when it was put up?
>
> A. I'm not exactly sure. It was after a union meeting that we had. Some people felt that we would like to put this out in front of the plant there that we wanted a fair contract.
>
> Q.Was it six months ago? Was it in '94? Was it in '90? Give me a ballpark
>
> A. I couldn't tell you. I think we probably voted on it when there was an open space.
>
> Q. When did you--when did you vote on it?
>
> A. We didn't. It went to a union committee
>
> Q. When's the first time you saw it?
>
> A. I couldn't tell you, '92, '93.
>
> Q. Could it have been the beginning of '94?

A. Could have been

Q. "Hey, Loral/ABS ... forget your last offer."And the members voted on this? The members voted on this?

A. No

Q. This was not your doing?

A. No, the members.

Q. When the members said Forget your last offer," what were they referring to?

A. I guess the final proposal. * *"

To sum up, the duty to arbitrate must be based upon an agreement. The 1988 contract between the parties had expired at 6:00 p.m. on August 10, 1991. The Company's offer was rejected and the parties had reached an impasse in bargaining. The Company implemented its final offer at 6:01 p.m. on August 10, 1991.

The Company has no binding obligation to arbitrate the instant dispute which arose under the Company's implemented final offer. No such agreement to arbitrate can be implied merely from the fact that employees worked for the Company after August 10, 1991. Mutual assent to a continuation of the expired contract and the Company's final offer

cannot be implied in light of the evidentiary record in this case.

Moreover, the obligation to arbitrate cannot be implied since the Union established that it was not bound by the no strike clause in the Company's final offer. As the Supreme Court stated in: *Gateway Coal Company v. United Mine Workers,* 414 U.S. 368, (1974) "* * the agreement to arbitrate and the duty not to strike should be construed as having coterminous application* * ." At page 374.

The evidentiary record warrants the conclusion that neither the Company nor the Union intended to be contractually bound after 6:00 p.m. on August 10, 1991. The fundamental principles of contract law apply in this case. The final offer was not accepted expressly or impliedly by the Union.

The Company's position that there is no agreement to arbitrate the instant dispute is sustained. The Union failed to carry its burden of proving that such an agreement existed between the parties.

AWARD

In light of the aforementioned considerations, the Company is under no contractual duty to arbitrate the instant dispute. The grievance is not arbitrable. Accordingly, the grievance is dismissed.

Dated March 1, 1995
Cuyahoga County

Cleveland, Ohio

HYMAN COHEN, Esq.
Impartial Arbitrator
Office and P. O. address:
Post Office Box 22360
Cleveland, Ohio 44122
Tel: 216-442-9295

BEFORE THE

AMERICAN ARBITRATION ASSOCIATION

- - -

ARBITRATION BETWEEN:

AIRCRAFT BRAKING SYSTEMS CORP., and	)	
	)	Grievance No. A-8712
INTERNATIONAL UNION OF UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL 856.	)	

- - -

BE IT REMEMBERED that upon the arbitration of the above-entitled matter held at the Holiday Inn, I-77 and Arlington Road, Akron, Ohio, before Arbitrator Hymen Cohen, Presiding, and commencing on Thursday, April 28, 1994, at 9:00 a.m. , at which time the following proceedings were held.

APPEARANCES

On Behalf of the Company:

Mr. Murray Portnoy
Labor Relations Consultant:
Portnoy, Messinger, Pearl & Assoc.
7001 Brush Hollow Road
Westbury, New York 10590

and

Mr. Edward Searle
Director, Human Relations
Aircraft Braking Systems Corp.
1204 Massillon Road
Akron, Ohio 44306-4186

On Behalf of the Union:

Mr. Robert Krunich
Local 856 Representative
155 George Washington Boulevard
Akron, Ohio 44312

Also Present:

Mr. Greg Megois
Mr. John Sprouse
Ms. Pat Harness

EXHIBITS

Number	Page	Description
JOINT		
J-1	22	Case# 5:94 CV 0496, Judge Dowd
J-2	23	1-29-92 Letter f / Mr. Calatrello
J-3	24	9-27-93 Drotney Decision
J-4	26	Case# 5:93 CV 873, Judge Bell
UNION		
U-1	41	9-11-91 Grievance Form
U-2	46	11-18-91 Searle Letter
U-3	47	Document Titled "Agreement Between Company & Union"
U-4	113	Eldreth's Notes
U-5	114	Eldreth's Notes
U-6	116	Eldreth's Notes
U-7	137	Computer Generated Report Re: Friction Products
U-8	143	9-27-91 Press Op. Classification
U-9	143	4-17-94 Press Op. Classification
U-10)	190	Receivers
COMPANY		
C-1	75	Document Titled "Final Proposal on all Economic & Non-Economic Issues
C-2	79	Article 5, Section 1
C-3	155	Airline Price List

THE ARBITRATOR: Let me just introduce and create a title for this case. This is an arbitration styled as: In the Matter of Aircraft Braking Systems and United Automobile Aerospace, Agricultural, Implement Workers of America (UAW) Local 856, involving Grievance number A-8779

MR. KRUNICH: No this is A-8712. Wrong document.

THE ARBITRATOR: Just indicate what the grievance number is.

MR. KRUNICH: A8712.

THE ARBITRATOR: Okay. Representing the company is Murray Portnoy, Labor Relations Consultant, from the firm of Portnoy & Messinger located in Westbury, New York. And representing the union is Bob Krunich, the Chairman of the Executive Bargaining Committee of Local 856 of UAW. The Arbitrator is Hymen Cohen with an address in Beachwood, Ohio.

The date is April 28, 1994. The hearing is taking place at the Holiday Inn on Arlington Road in Akron, Ohio.

THE ARBITRATOR: Are you ready to proceed?

MR. PORTNOY: Before we proceed, I would like to state for the record - -

THE ARBITRATOR: Do you want to go on the record right now?

MR. PORTNOY: Yes, sir.

THE ARBITRATOR: Okay. On the record.

MR. PORTNOY: We are here under protest. We are here -- there is no collective bargaining agreement in effect. There's no agreement that you can rule your authority from.

We're here as a result of a decision by Judge Bell that he mistakenly assumed as a creature of an implied contract that's currently up on appeal, and in our opinion that appeal will prevail, and that would render any decision that you find moot

We have been working under the company's final proposal which we implemented on August 10th of 1991, and that proposal provided that the agreement would go into effect on the date of ratification, on August 10th or the date of ratification, whichever is later.

Under the AAA rules itself, the rules provide that the Arbitrator's authority comes solely from the collective bargaining agreement. There can't be by any party a unilateral imposition of an arbitration provision, no more than there can be a unilateral imposition by the union of a no-strike provision.

So absent an agreement, I would urge the Arbitrator to defer the proceedings until Judge Bell's decision is either overturned or confirmed. There is no collective bargaininq agreement in effect. There is no basis for an arbitration, since arbitration itself is an extension of a collective bargaining agreement.

So we want to be on record that we are protesting. We have no choice but to be here so as to avoid contempt of court, but there is going -- there can't be a dispute or a violation of an agreement that does not exist

THE ARBTTRATOR: Mr. Krunich?

MR. KRUNICH: First of all, for the record, per a telephone conversation between Ed Searle and myself, I stated the union cannot afford at this point in time -- and is that correct, that you said that the company would pay for the Reporter?

MR. PORTNOY: We're not going to ask you to pay that. Mr. Searle indicated that yesterday.

MR. KRUNICH: I just wanted It for the record

MR. PORTNOY: That's tine.

MR. ECRUNICH: Will the company pay for our copy too?

MR. PORTNOY: No.

MR. KRUNICH: Then we don't agree for the reporter.

MR. PORTNOY: Are you objecting?

THE ARBITRATOR: Aside from that issue, would you please address the issue ot -- the transcript is

basically quite subsidiary and relatively unimportant to the statement just made by Mr. Portnoy.

MR. KRUNICH: Judge Bell had ruled that we do have an interim contract. I can prove through testimony and documents the union does have a contract with Aircraft Braking Systems. It we proceed, we'll prove that. And we have arbitrated other cases.

THE ARBITRATOR: Let me indicate at the out set, frorn what I've heard from Mr. Portnoy, from what you stated -- I don't have Judge Bell's decision in front of inc, and if I did it would take tine to read it and understand it.

Number *2,* why am I here? From Mr. Portnoy's statement, apparently Judge Bell has ordered the parties to proceed to arbitration. I guess that's why I'm here.

However, Mr. Portnoy raises a threshold issue, and if that issue will certainly be covered during the course of the arbitration hearing, I have no problem with that, none whatsoever. But I must say that the statement by Mr Portnoy is somewhat troubling to me.

If both parties understand the way arbitrators ar selected by the American Arbitration Association, I know nothing at all about this dispute, nothing. I come here basically with several letters of correspondence from AAA. I've never met the gentlemen to my right. I've never met the gentlemen to my left, in fact.

I'm confronted at the outset with Mr. Portnoy's statement that there's no contract in existence, that the company is here under compulsion ot judicial order. And I 'm told by Mr. Krunich that a contract will be established during the course of the hearing. That's where we're at right now.

MR. KRUNICH: May1? Judge Dowd made a ruling on Good Friday.

MR. PORTNOY: Not Judge Dowd, Judge Bell.

MR. KRUNICH: No, Judge Dowd, that we were allowed to proceed with this grievance, 8712.

THE ARBITRATOR: I'm here to proceed. I'll take my case from the parties. You people run the show, I don't. I'll make my decisions accordingly. I've had an awful lot of experience in this field, and I must say that to come to a hearing and be told at the outset that there's no contract in existence, nor do I have any authority is somehow --

MR PORTNOY: Just to get the record straight, Mr. Arbitrator, what Judge Dowd did was deny a preliminary injunction. He did not order that this arbitration take place, and we'll make that part of the record.

MR. KRUNICH: Mr. Arbitrator, would you like a copy of that decision?

THE ARBITRATOR: I'll take whatever the parties wish to submit to me, subject of course to the comments made by the other party.

MR KRUNICH: Would you like to stipulate

MR. PORTNOY: Before we stipulate, there are a lot of documents. We had proceeded to an arbitration on the Dubo deferral, and we'll have to get into line with that.

All I would say is that the burden falls on the union to establish that there is a collective bargaining agreement for you to draw your authority before we can entertain the grievance. Because if they can't establish there's an agreement, then I don't know from where you draw your authority.

If the union, for instance, during the course of this testimony says that the arbitration provision and the no-strike provision are binding on the parties for the duration of this agreement, we might not even have a pissing contest.

I'd like to know from the union what is the effective date of this so-called agreement and what is the expiration date of this so-called agreement.

MR. KRUNICH: Judge Bell hds already made that decision for us. We are not trying to establish a contract on our own. Judge Bell has established --

MR. PORTNOY: Judge Bell 's document will speak for itself. You can't speak for Judge Bell and I can't.

The Arbitrater will have Judge Bell's decision, and if in the Arbitrator's opinion Judge Bell established a effective date and expiration date, so be it. You can't argue for Judge Bell.

MR. KRUNICH: The union came here to arbitrate, not to argue Judge Bell's decision. We would like to proceed with arbitration.

MR. PORTNOY: We would like to establish first for the benefIt of the Arbitrator as well as ourselves that there is ant agreement for the Arbitrator to draw his authority and the documents of Judge Bell and Judge Dowd will have to speak for themselves, because neither one of us can produce those two judges.

THE ARBITRATOR: You realize the dilemma that I as an Arbitrator find myself in. I take a drive from the eastern suburbs of Cleveland, I come here assuming there's an arbitration, and I'm confronted at the outset by an assertion by the company's representative that I have no authority because there's no agreement in existence, but that the company's been compelled to participate in this proceeding, whatever this proceeding may be called, because of such judicial order. I don't know what to say.

As both parties are very much aware, or they may be aware of this, I have no authority at all unless there is an agreement.

MR. KRUNICH: Mr. Arbitrator we're not asking you -- the union is not asking you to overstep Judge Bell's authority. We're simply asking that we be

allowed to proceed. AAA has scheduled this arbitration knowing full and well that we do have the right to arbitrate. We do indeed have an interim contract, and we would like to proceed with arbitration.

MR. PORTNOY: Mr. Arbitrator, the AAA serves as you know, merely as the vehicle to establish a panel. AAA did not take part in the court proceedings because it's not their policy to take part. AAA has some fine rules that they go by that say that the only authority that the Arbitrator has is that which comes tram a collective bargaining agreement I'm sure that the Arbitrator's aware that, while the company can unilaterally impose wages, conditions of employment, the company cannot unilaterally impose an arbitration clause, no more than they can unilaterally impose a no-strike provision.

We don't have a no-strike provision, and under all the case law -- and I'm going to inundate you with case law -- shows that arbitration is a quid pro quo for a no-strike provision. That goes back to the very genesis of the act, of the National Labor Relations Act. And we have no no-strike provision.

If the union said to us that there is a no-strike provision in this interim agreement that goes from three years from the date of ratification, I will withdraw my objections. But I'm entitled as an employer, if I'm going to be compelled to arbitrate, to have the position of labor employees that I have a no-strike provision for the duration of what they say is

an interim agreement, which goes for three years from the date of ratification.

The contract has not been ratified. Therefore, I have no guarantee of no-strike, unless the union wants to say to me now that we have a no-strike provision that's good for that period of time.

THE ARBITRATOR: Let me indicate I have taught the course of labor law for ovcr 25 years.

MR. PORTNOY: I'm sure. I know your background.

THE ARBITRATOR: I know something about many of the terms that you've referred to. As an Arbitrator, however, I don't get into legal questions. Both parties know that. I'm basically a reader of a contract.

MR. PORTNOY: Great I agree with that, sir.

THE ARBITRATOR: And as a result, given that the AAA has scheduled this hearing, certainly as a threshold matter I'm willing to hear the union's case. And if the company wishes to it can present no evidence, if it wishes to. If you just indicate that given what the evidence is after the union has made its case-in-chief there is no authority for me to act, fine. That's quite all right.

But I'm not getting into any Dubo issues, any deferral issues, any quid pro quo as to no-strike. Those matters are for courts, not for me. Those isssues basically are for the court. I don't resolve such issues.

MR PORTNOY: I don't disagree All I'm saying is that, in view of the fact that this is up for appeal, and given the fact that in order for a company to be able to adequately defend itself, there has to be an agreement.

We're being accused of violating an agreement. We would think it's incumbent upon the Arbitrator to establish that there is an agreement.

THE ARBITRATOR: Fine. The union is going to attempt to do that. Fine. And I just indicated that as part of the case-in-chief I would like to hear testimony. I would certainly want to see some type of written arrangement, whether it be called a bargaining agreement or anything else. Fine.

The employer can proceed and somehow establish through testimony that there is no agreement under which I have any authority. Fine. That's quite all right with me. That's no problem.

MR. PORTNOY: But absent an agreement, how do we --

THE ARBITRATOR: Wait. I'm under the impression the union indicates there is an agreement. Therefore, they proceed first. I am under the assumption that this is a displite involving contract interpretation rather than discipline or discharge. Is that correct?

MR. PORTNOY: It's a matter of an alleged violation of an agreement.

THE ARBITRATOR: Okay. An alleged violation of an agreement. And therefore it's an alleged violation in dealing with an interpretation -- in fact, strike the word interpretation .

Apparently, from what the employer has just stated, the first question I have to resolve is whether or not there is an agreement in fact between the parties under which I have authority;

Secondly, assuming that I find that there is such an agreement, whether or not the union has sufficiently established through evIdence by way of testimony and documentation that the company has violated such an agreement. Is that correct?

MR. KRUNICH: Yes, sir, Mr. Arbitrator.

MR. PORTNOY: I would say that once we established that, that the company has the right to establish that the violations of the -- find that there's some kind of an agreement, which I don't know how you can do that.

THE ARBITRATOR: That's the first issue.

MR. PORTNOY: Then the issue has to be framed so that either party tnat has a grievance, that the grievance that you say exists covers both issues.

For instance, being very specific, we threatened arbitration at one point, and we knew it couldn't get to arbitration because there was a violation of the no-strike provision, and there are

certain money damages. We would want that incorporated into the dispute.

So you have a violation of the agreement, and you have what's scopatory to the violation of that agreement, plus you have a claim by the company as to certain damages that occurred by the violation if there is that agreement. No-strike provision was violated, and that's germane to the grievance that they're raising.

THE ARBITRATOR: I don't know how to answer you, Mr. Portnoy, since I don't know anything at all about the dispute.

MR. PORTNOY: I don't want to take you by surprise later. I want you to know, if there is this interim agreement, it has been violated by the union in the first instance, which led to the grievance that you're currently going to have.

THE ARBITRATOR: The union apparently alleges a violation of an agreement in existence. Is that correct?

MR. KRUNICH: Yes, sir, that's correct.

THE ARBITRATOR: Fine. And since we're here, since the AAA has requested the parties to be here, and apparently the parties are here pursuant to some judicial decree, I think we should proceed.

Certainly if the union cannot adequately establish that agreement, fine. I can rule on that type of issue without any difficulty whatsoever.. But

as far as getting into labor law issues, labor law issues are not for an Arbitrator.

MR. PORTNOY: And it's not for me, because I'm not a lawyer.

THE ARBITRATOR: I'm just indicating. I am a lawyer. It would basically betray the concept of arbitration.

MR. PORTNOY: I agree with you.
THE ARBITRATOR: They're really irrelevant. After the decision if a party doesn't like it, they can go elsewhere And I'm sure

MR. PORTNOY: I've heard regional directors say to go somewhere else.

THE ARBITRATOR: I don't know what to say, but certainly I am ready to proceed.

MR. PORTNOY: I am too, I would like to request on the record that we sequester the witnesses.

THE ARBTTRATOR: Are you ready to proceed with joint exhibits, if any, by the parties?

MR. KRUNICH: Prior to that I'd like to ask that -- we need a copy of the stenographer's notes for the record.

THE ARBITRATOR: Mr. Portnoy$_1$ is there going to be a record of the transcript ordered by the Company?

MR. PORTNOY: Yes, sir.

THE ARBITRATOR: If you want that to be the official record, the union has to have access to that.

I don't believe -- and I ruled on this in the past that the company has to pay *for* the transcript for the union. But if the union can have that transcript for several days to look it over, that would be highly appropriate.

Or else I will indicate to the parties that nhe transcript will not be the record of this hearing my notes wIll be, and therefore the court reporter here is a waste of time.

MR. PORTNOY: I will certainly give the union the opportunity to read the record. I don't see why I should have cause to give them a record.

THE ARBITRATOR: I understand. The company is not obligated to pay for the transcript for the union, not at all. However, the company should be required to give you access to the transcript. So perhaps you can make a copy of it and return the transcript to the company as soon as possible.

I will say again for the record that without the union's agreement to make the record accessible to the union, the record of this hearing made by this court reporter will not constitute the official record to be given.

MR. PORTNOY: I want to again reiterate, the transcript will be in the Human Resource Department, and the union will have access to that.

MR. KRUNICH: I had one question. Will they allow us to make a copy?

MR. PORTNOY: I have no problem with that

THE ARBITRATOR: No problem?

MR. KRUNICH: Thank you so much.

THE ARBITRATOR: Are there any joint exhibits? Okay. We have a case from the

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

Aircraft Braking Systems Corporation,	)	
Plaintiff,	)	CASE NO. 5:94 CV 873
vs.	)	
	)	Judge Sam H. Bell
uUAW Local 856	)	
	)	ORDER
Defendants	)	

Now pending before the court is a motion by plaintiff seeking an injunction against pending arbitration proceeding. Defendant has filed a counter-claim seeking an order compelling the same arbitration. The temporary injunction sought by plaintiff was not granted because, when sought, that motion was "untimely" in that the temporary injunction was sought more than ten days prior to the scheduled arbitration. Only a preliminary injunction has sufficient duration to properly bind the parties. A hearing was held on the motion for a preliminary hearing. Based on the evidence and arguments presented at that hearing and in the briefs filed, the court now rules.

Defendant is the certified bargaining representative for plaintiff's production and maintenance employees. On August 10, 1991, the collective bargaining agreement between the union and

ABS expired. On that same date, ABS unilaterally imposed the terms ot its final offer to the union.

> The Contract between U.A.W., Local 856 and Aircraft Braking Systems Corporation . . . is hereby extended and renewed for a period of three years from August 10, 1991, or the date of ratification whichever is later except as specifically amended hereinafter.
>
> . . .
>
> 3. Employees on the active payroll as of August 10, 1991, shall receive a lump sum payment of $800.
>
> 4. Employees on the active payroll on the first anniversary date of the contract shall receive a lump sum payment of $800.
>
> 5. Employees on the active payroll on the second anniversary date of the contract shall receive a lump sum payment of $800.
>
> 14. All Company proposals dated June 20, 1991, and all tentative agreements will be incorporated into the Basic Labor Agreement . . . except as modified by the attached Company proposals.

(Complaint Exhibit A.) On September 3, 1991, defendant filed a grievance with plaintiff claiming that plaintiff violated the above-quoted, unilaterally implemented contract because the Company refused to pay the bonus promised in paragraph 3. (Complaint Exhibit B.)

The Company claims that it is not required to arbitrate this grievance. The only questions now before this court are first, is there a valid arbitration clause which governs these parties and, second, does the instant grievance fall within the terms of that arbitration clause.

The contract imposed by plaintiff explicitly adopted proposals dated June 20, 1991 (Exhibit A, 4.) One of those proposals modified the arbitration procedures followed as the last step in the grievance process. The proposal changed the composition of the arbitration panel to utilize the services of the American Arbitration Association. (Exhibit E.) The proposal did not alter any substantive provisions of the prior arbitration clause and did, by only changing specified paragraphs, implicitly incorporate the prior arbitration clause. In fact, defendant's Director of Human Resources, Edward Searle, completely agreed that the prior arbitration clause, subject to modifications to use the A.A.A., was "put in place when we implemented the final offer." (T. 42-43.)

On August 16, 1991, less than a week after plaintiff unilaterally implemented its final offer, plaintiff informed defendant that it would enforce the no-strike clause in the imposed agreement by resorting to arbitration.

> You are hereby notified that Aircraft Braking Systems' employees engaging in any actions involving a sit-down, stay-in, slow-down, or any curtailment of work, or restriction or interference with production are in direct violation of

> Article V of the Basic Labor Agreement. Any employees engaging in such act will be terminated in accordance with the Basic Labor Agreement.
>
> Also, in the event such incidents occur the Company will demand arbitration to determine to what relief the Company is entitled, including monetary damages.

(Trial Exhibit D.) Mr. Searle testified that the arbitration to which the letter referred was the arbitration provided for in part of the imposed collective bargaining agreement. (T. at 46.)

Plaintiff has participated in arbitration concerning a score of grievances *as* recently as April, 1993. In fact, at the same time plaintiff was claiming that there was no contractual arbitration clause, plaintiff was preparing to arbitrate the case of one Pamela Aubele. (T. at 46-48.) These arbitrations were conducted through the A.A.A., consistent with the June 20, 1991 proposed modifications of the collective bargaining agreement.

The case of Ms. Aubele and 32 other employees was considered by the National Labor Relations Board. The NLRB deferred consideration of the charge.

> The Union has filed grievances which encompass issues raised in the charge. The grievances are currently pending in the

> contractual grievance procedure. which culminates..in final and binding arbitration.
>
> In view of these circumstances, further processing of the charge will be deferred inasmuch as the grievance-arbitration procedures of the collective-bargaining agreement are being actively pursued .

(Trial Ex. 15 (emphasis added)). The HIRE apparently reached this decision in January 1992 because plaintiff represented to the NLRB that the company did have an arbitration procedure in effect. (T. at 50.)

The record clearly supports the conclusion that plaintiff is willing to invoke the mandatory grievance-arbitration clause of the imposed contract as both a sword and shield in dealing with its own employers and the NLRB. When the same clause is turned against them, as in the instant case, plaintiff is unwilling to admit to the reciprocal obligation which seemingly flows from the clause twice invoked defensively by plaintiff itself. Moreover, plaintiff waited eighteen months to raise the objection to arbitrability, assuring that defendant could not refile a charge with the NLRB. Therefore, not only has plaintiff selectively chosen to adhere to the terms of the contract which plaintiff chose to impose, it has exercised this choice in a manner, whether calculated or not, which most prejudices defendant.

The court is mindful that "arbitration is a matter of contract and a party cannot be required to

submit to arbitration any dispute which he has not agreed so to submit." Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960). Traditional contract law is liberally construed in this area to reflect the strong congressional policy favoring arbitration. John Wiley & Sons v. Livingston, 376 U.S. 542, 548 (1964).

Plaintiff's primary argument is that no agreement to arbitrate currently exists between the parties. This court cannot agree. First, plaintiff explicitly testified through Mr. Searle that the contract imposed on the union did contain an arbitration clause Second, plaintiff also testified that arbitrations subsequent to I August 10, 1991 were conducted pursuant to the arbitration provision as contained in the modified contract imposed on August 10. Third, plaintiff testified and documentary evidence supports the fact that plaintiff threatened arbitration against the union for violation of the terms of the imposed contract. Finally, plaintiff testified that they represented to the NLRB that a contractual grievance-arbitration process was in effect.

Quite simply, every tangible indicia of the intent of the parties shows that both sides believed and behaved according to the view that a grievance-arbitration agreement was in force between the parties. It is impossible for this court to conclude otherwise because the court is necessarily constrained by the relevant facts and applicable law.

Plaintiff's decision to unilaterally implement a contract is plainly an offer for "interim" employment.

No other legal significance can be attached to the August 10, 1991 letter. By its terms, that letter sought neither ratification nor reply by the union. To the contrary, acceptance of such an offer is manifested by continuing performance. The unilateral offer contained as one of its terms an agreement to arbitrate grievances. If accepted, plaintiff can no more renege on the promise to arbitrate than it could decide to reduce wage scales or eliminate promised health benefits after work was performed.

plaintiff's unilateral offer for interim employment was accepted. Plaintiff's cross-examination of defendant's president, Don Hurr, clearly established the fact that the union has agreed to comply with the terms of interim employment while continuing to seek a more advantageous permanent agreement. Mr. Hurr even agreed,with plaintiff that the no-strike clause referenced in the August 16, 1991 letter was implemented. (T. at 66.) Most telling of all, the employees have continued to work for over 20 months under the imposed terms without violation of the no-strike clause.

Such an offer and acceptance is plainly reasonable and has been accepted by the courts. See United Paperworkers Int'l Union v. Int'l Paper Co., 920 F.2d 852, 857 (11th Cir. 1991) ("We have no conceptual difficulty in understanding that an employment arrangement that was unacceptable as a permanent, formal agreement might still be acceptable as a temporary, stop-gap measure.") In United Paperworkers, the Eleventh Circuit held that a unilaterally implemented contract coupled with the

union's commitment not to strike without ten-day notice created an interim contract including the arbitration provision.

The conduct of both parties is consistent with a finding that an interim agreement containing a grievance-arbitration clause exists. The law recognizes the binding effect of such an agreement. Plaintiff does not challenge the fact that defendant's grievance is properly a subject of the grievance-arbitration clause. Plaintiff's only remaining arguments are that delay has rendered defendant's grievance untimely and that the HIRE has twice resolved this grievance.

Plaintiff claims that defendant's grievance "languished in limbo for a year and a half [sic]." (Reply Memo at 6 Plaintiff's claim arises from a difference of view in relation to the record. Mr. Searle testified that the grievance was timely filed in August 1991. (T. at 40.) Searle also testified about the grievance procedure followed by plaintiff. Under that procedure many grievances remain outstanding pending submission to arbitration in the apparent hope that these grievances will ultimately be resolved without recourse to the expense of arbitration. (See e.g., Exs. A, B & C.) In short, by the procedures followed by plaintiff, the instant grievance is not untimely.

Plaintiff's claim that the NLRB twice resolved the instant grievance is also based on the same type of logic. The charges filed with the NLRB relate to plaintiff's unwillingness to bargain in good faith as

partially evidenced by plaintiff's unwillingness to pay the compensation promised in paragraph 3 of the August 10 letter. (Exs. 9 and 11.) In contrast, the current grievance does not concern plaintiff's statutory obligation to bargain in good faith; the current grievance concerns plaintiff's legal obligation to fulfill the promises contained in the August 10 letter. The NLRB's disposition of the charges filed before it do not resolve plaintiffts alleged breached promise.

In sum, an agreement to arbitrate does exist and the instant grievance is within the terms of that arbitration agreement. Plaintiff's motion is DENIED and defendant's motion is GRANTED. plaintiff is hereby ordered to submit grievance A8700 to binding arbitration pursuant to the modified section IV implemented by the August 10, 1991 letter.

IT IS SO ORDERED.

/s/_____
Sam H. Bell
U.S. District Judge